THE TOUCHSTONE OF Wills, Testaments, AND Administrations.

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BEING

A COMPENDIUM OF CASES & RESOLUTIONS

Touching the same.

Carefully collected out of the Ecclesiastical, Civil and Canon-Laws, As also out of The Customs, Common Laws, and Statutes of this Kingdom.

By G. MERITON, *Gent.*

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To all his loving Country-men.

Dear Friends,

HAving received a deep impreſſion in my thoughts of that Chriſtian-like Moral, *Non nobis ſolum natiſumus, ſed partem Parentes, partem Amici, partem Patria vendicant*; I thereupon begun ſeriouſly to excogitate how I might lay out that ſmall Talent which the Lord hath lent me, to the profit and good of my Country: and taking notice of the Quotidian enmities, Contentions, and Quarrels, which ariſe amongſt men about the Deviſes, Bequeſts and Legacies of their dead Friends, which moſt commonly happens by reaſon of the vitious penning of their Wills and Teſtaments, and is chiefly occaſioned through the ſcarceneſs of Writers on this Subject in our Engliſh Tongue; there being very few Books in the ſame Language ſave Mr. *Swinbornes* excellent Treatiſe Teſtamen-

tary, which is now almoſt out of Print, and can hardly be gotten at any Stationers; and beſides, the price thereof doth exceed many honeſt Countrymans purſe; and ſo many men are left in miſts of ignorance, by reaſon whereof their Wills and Teſtaments are often ſo ſtrangely drawn, with ſo many dubious, knotty, and ſometimes nonſenſical Clauſes and Sentences therein, as that often the Teſtators meaning can ſcarcely, and ſometimes not at all be found out; whereupon it happens that ſometimes the Bequeſts and Deviſes are voyd, and ſo the Legataries looſe that which was intended them: otherwhiles they are forced to ſue for their Legacies, whenas Doubts ariſe upon the Teſtators words and meaning in his Will, and then often the Remedy proves worſe then the Diſeaſe, and more Charges ſpent in the Law for the recovery of the Legacy, then ſometimes it is worth: Therefore, that my honeſt Countrymen may be partly informed

in

in ſome particulars how they may diſpoſe of their Eſtates at their deaths, and that they may make their Wills according to Law, ſo that their intentions and meanings may not be perverted and wreſted to a wrong ſence after their Deaths, and thoſe who were intended and expected to reap benefit by the Teſtators death, robbed of their juſt Rights and Dues; I have thereupon taken the pains to collect ſeveral Caſes and Reſolutions out of the Eccleſiaſtical, Civil, and Canon-Laws, and alſo out of the Cuſtoms, Common-Laws, and Statutes of this Realm touching Wills and Teſtaments, their ſeveral ſorts and forms, what ſhall be a good Will, who may make one, and who may be an Executor, and of the ſeveral ways of appointing them; and alſo touching Tutors, Childrens Portions, Deviſes, and Legacies; together with the Probat of Wills, paſſing Accounts, payment of Mortuaries; and of the power of the Ordinary in granting of

Adminiſtrations; and touching Appeals, and ſeveral other things, whereby my Countrymen at an eaſie charge and with little expence of time, may now take a view of thoſe things which have ſo long been kept from their ſight under the Vizard-Mask of an unknown Tongue, and they thereby deprived of the knowledge thereof. And now, Dear Countrymen, (for to you only do I ſpeak) if I can have but your good-will, and good word for all this, it ſhall ſuffice

Your loving Countryman and ſervant,

GEORGE MERITON.

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What

THE TOUCHSTONE OF WILLS and TESTAMENTS.

CHAP. I.

What a Teſtament is, with the ſeveral kinds and forms thereof; and the difference between a Teſtament, a laſt Will, and a Codicil.

1 A Teſtament is derived of *Teſtatio Mentis*, and moſt properly is defined after this manner: *Teſtamentum eſt voluntatis noſtræ juſta Sententia, de eo quod quis poſt mortem ſuam fieri voluit.*

luit. A Teſtament is a juſt ſentence of our Will touching that which one would have done after death. *Brac. Latches Rep. fol.* 137. *Cowells Inſtit. pa.*117. *Swinbornes Wills, &c. part* 1. *Sect.*2. *in princ. Juſtinians Inſt. Tit.* 10. *l.*2. *de Teſt. numb.* 1.

2. Every Teſtament is a laſt Will, but every laſt Will is not a Teſtament; for a laſt Will is a general word, and agreeth to every ſeveral kinde of laſt Will, or Teſtament; but it's properly to be called a Teſtament, when an Executor is named: for by the naming an Executor, it differeth from the reſt. *Franc. Mantica de Conjectura ultimar. voluntatum, lib.*1. *Tit.*5. *Swin. part.*1. *Sect.* 1. *Simo. de Prætiſ. de Interpretatione ult. vol. lib.*2. *Dubium* 1. *Solutio* 9.

3. Obſerve that of Teſtaments, ſome be written, ſome unwritten or Nuncupative; ſome ſolemn, ſome unſolemn; ſome priviledged, and ſome unpriviledged of every kinde, whereof we ſhall ſpeak a word or two.

two. *Michael. Graſſ. Theſaur. com. opinion. Sect. Teſta. Queſtio* 10, 11. *numb.* 1,3. *Franc. Mantica de Conject. ult. vol. lib.* 1. *Tit.* 7. *Swin. part* 1. *Sect.* 8.

4. Now as to the formal making of a Solemn Teſtament, many things are requiſite by the Civil Law. As 1. That there be ſeven Witneſſes preſent at the making thereof. 2. They muſt all be required to be there on purpoſe: for it is not ſufficient, if they were there onely by chance, and unrequeſted. 3. Every Witneſs muſt ſubſcribe his Name with his own hand, if he can write, or elſe two or three others for him. 4. The Teſtator with his own hand alſo muſt write his own Name, and the Name of him whom he will have to ſucceed him, and have all his goods; and if the Teſtator cannot write, then he muſt name the party (that ſhall ſucceed him) before the Witneſſes. 5. The Witneſſes muſt be ſuch as are not prohibited in that behalf.

6. The Witneſſes muſt ſee and behold the Teſtator, and not hear him onely; and the Witneſſes alſo muſt ſeal the Teſtament, either with their own, or the ſeal of ſome other. And laſtly, the Teſtament muſt be finiſhed at one time, without any Intermiſſion, except natural, ſuch as cannot be avoided: And if any of theſe particulars be wanting, then it is reputed for a ſolemn Teſtament; but here in *England*, we are not neceſſarily tyed to obſerve this ſtrict form of making our Teſtaments.

5. For with us it is ſufficient, if the Teſtator do appoint his Executor, and declare his Will before two or three Witneſſes, whoſe probation of the ſame, as concerning the appointment of an Executor, or diſpoſing of Goods and Chattels, is good enough; and ſuch a Teſtament is called an unſolemn Teſtament. *Lyndwood in C. Statut. verb. Probatis lib. 3. Provincial. Conſt. Cant. Brac. lib. 1. C. 16. Swin. part 1. Sect. 3. and part. 4. Sect. 24. Glan. l. 7. C. 6.* 6. But

6. But if the Teſtator deviſe any Lands, Tenements, or Hereditaments, then the Teſtament muſt be in writing, and done in the life-time of the Teſtator, and approved by him for his Will before his death; except in ſome ſpecial Caſes. *See the next Chapter, Num.* 37. 32 *H.* 8. *cap.* 5. *Noy's Maximes p.*97. *& Swin. part* 1. *ſect.* 11. *& part* 4. *ſect.* 25.

7. Alſo if a man pleaſeth, he may make his Teſtament in writing, wherein he diſpoſes of his Goods and Chattels only; and may alſo uſe the teſtimony of more Witneſſes then two, and procure them to ſubſcribe their names to every ſheet of the Teſtament; which is very ſafe, and may prevent many forgeries. *Swin. part* 1. *ſect.* 10. *num.* 4.

8. The moſt uſual form of Wills and Teſtaments with us here in *England*, is after this manner. *In the name of God Amen. The tenth day of* April, 1667. *in the nineteenth*

The form of a Teſtament or laſt Will.

teenth year of the Reign of our moſt gracious Soveraign Lord King Charls the Second of England, &c. I Peter Style of B. in the County of York, Gent. being ſick and weak in Body, but of ſound and perfect memory (thanks be to Almighty God for the ſame.) And calling to mind the uncertain ſtate of this tranſitory life, and that all fleſh muſt yield unto death, when it ſhall pleaſe God to call: and being deſirous to ſettle things in order, do make this my laſt Will and Teſtament, wherein is contained my laſt Will and Teſtament in manner and form following; revoking, and abſolutely annulling by theſe preſents, all and every Teſtament and Teſtaments, Will and Wills heretofore by me made and declared either by word or by writing, notwithſtanding any promiſe to the contrary, or Clauſe derogatory in the ſame; And this to be taken only for my laſt Will and Teſtament, and none other.

A ſpecial Revocation of a former Will See the next Chapter, Num. 34.

First,

Firſt, I bequeath my Soul to Almighty God my Maker, and to Jeſus Chriſt my Redeemer, and to the Holy Ghoſt my Sanctifier; and my Body to the Earth from whence it came, to be buried in ſuch decent and Chriſtian manner, as to my Executors ſhall be thought meet and convenient; there to reſt until my Soul and Body ſhall meet again, and be joyned together at the joyful Reſurrection, and be made partakers of the never-fading joys of immortality, which God in mercy, through the merits of Jeſus Chriſt alone, hath promiſed and prepared for all thoſe that truly and unfeignedly repent and believe in him. And touching ſuch Temporal Eſtate of Goods, Chattels and Debts as the Lord hath been pleaſed far above my deſerts to beſtow upon me, I do order, give, bequeath, and diſpoſe the ſame in manner and form following. Imprimis, *I give and bequeath unto my Son* Henry Style, *when he ſhall attain the age of one and twenty years, the ſum of Forty pounds of*

Obſerve the difference between theſe two Bequeſts; In the firſt Caſe nothing is due till the age of 21 years; but it is otherwiſe in the ſecond Caſe, for there it may be recovered by the Executors or Adminiſtrators of the Childe, though he die before the age of 21 years.

lawful mony of England, *to be paid to him by mine Executors hereafter named.* Item, *I give and bequeath to my Son* Thomas Style *Forty pounds of like money, to be paid to him (by my ſaid Executors) when he ſhall attain the age of one and twenty years.* Item, *I give, &c. And laſtly, I make, conſtitute, ordain and appoint my deare and well beloved Wife* Mary Style *ſole Executrix of this my laſt Will and Teſtament, to whom I bequeath all the remainder of my Goods and Chattels, moveable and immoveable, after the ſatisfaction of my Debts, and payment of the Legacies above by me bequeathed. And to her care and tuition alſo I leave all my Children, and I do hereby nominate & appoint my ſaid Wife Tutrix to them and*

A clauſe whereby the tuition of the Teſtators Children is committed to the Executor.

and every of them, until ſuch time as they ſhall ſeverally attain their ages of one and twenty years. In witneſs whereof I have hereunto ſet my hand and ſeal, the day and year firſt above written.

Peter Style.

9. But no man is tyed to obſerve this, or any other ſet form in the making of his Will, for it skills not how it be drawn, ſo as the Teſtators meaning can but be found out; neither is it material whether the Teſtament be written in parchment or paper, or the like ſtuff apt for writing; nor what Language the ſame be written in, either Latine, Greek, French, or any other Tongue; nor whether the ſame be written in Secretary, Roman or Court-hand, or any other hand, ſo that the ſame may be but read and underſtood; nor is it material with what Notes or Characters the ſame be made, as XX *s.* for twenty ſhillings, CL *l.* for an hundred and fifty

fifty pounds, 1590 for one thouſand five hundred and ninety, with ſuch like; or the Figure (1) inſtead of the Letter A. or (2) inſtead of the Letter B. *&c.* or ſome other more ſtrange Characters; yet it is good enough, if the ſame by any means can be but read and underſtood; unleſs the ſame Writing be but only a Preparation to the Teſtament, and not the Teſtament it ſelf: for then in ſuch Caſe, though the ſame may be read and underſtood; yet it is of no force, and the party ſhall be ſaid to dye Inteſtate. *Michael. Graſſ. Theſaur. com. opinion. ſect. Teſt. Queſt.* 10. *Swin. part.* 4. *ſect.* 25. *numb.* 2,3,4,5,6. *Juſtinians Inſt. l.* 2. *Tit. de Teſt. ordinandis numb.* 12.

10. Words and Sentences alſo are not of neceſſity required for the form of a Teſtament, but onely for the expreſſing of the will and meaning of the Teſtator; and therefore if the Scribe omit ſome words by Error, whereby the ſence is imperfect: As for

for Example, if he write thus; *I make my Wife my of this my laſt Will and Teſtament*, leaving out this word *Executrix*; yet in this Caſe his Errour ſhall not hurt; it for the Law doth preſume more was ſpoken, though leſs was written; and therefore ſhe ſhall be taken for Executrix. *Swin. part* 4. *ſect.* 25. *numb.* 7. *Molin. in l.* 1. *c. de Teſt. ſect. de verb ob. numb.* 8. *in fin.*

11. Alſo if there be no Witneſſes of a written Teſtament, yet if it be certain and undoubted that the Teſtament is written or ſubſcribed with the Teſtators own hand, it is ſufficient; but if it be doubted whether it is his hand or no, then the Teſtimony of Witneſſes is neceſſary to confirm the ſame to be the Teſtators own hand: or where there is no ſuſpition of fraud, proof may be made and allowed by comparing of hands with other writings ſigned by the Teſtator. *Maſchard. de probat. verb. Teſtament. Concluſ.* 1352. *numb.* 60. *Swin. part* 4. *ſect.*

ſect.25. numb.8. Michael.Graſſ. Theſaur. com. opinionum, ſect. inſt. 2. 16. n.6.

12. Having ſpoken of a written Teſtament, we ſhall now ſhew what a Nuncupative Teſtament is, and that is where the Teſtator by word of mouth, before a ſufficient number of Witneſſes, doth declare his mind, and names his Executor; and this Teſtament is of as great force and efficacy as a written Teſtament, except where Lands, Tenements and Hereditaments are deviſed: and to the making of this Nuncupative Teſtament, no preciſe form of words is required, neither is it material whether the Teſtator ſpeak properly or unproperly, ſo that his meaning do appear, as is ſhewed before. It is called *Nuncupative à Nuncupando, id eſt, Nominando*, of naming an Executor; and is moſt commonly made when the Teſtator is very ſick and weak, and paſt all hope of recovery. *Molineus in l.1. ſect. Teſt. ordin. ff. de verb. ob. numb.*

numb. 8. *in fin. Juſt. Inſtit. ſect. de Teſt. ordinandis in fine. Minſing. in D. ſect. final. Swin. part* 1. *ſect.* 12. *& part* 4. *ſect.* 26. *Terms of the Law, verb. deviſe. Noyes Maximes, pa.*96. *Perkin, numb.*476.

13. If ſuch a Teſtament be put in writing after the Teſtators death, yet it remains a Nuncupative Teſtament ſtill. *Noyes Maximes, pa.*96. *Swin. part* 1. *ſect.* 11. *numb.*2. *in princ.*

14. A man hath that priviledge in a written Teſtament, which he cannot have in an Nuncupative Teſtament; for in a Nuncupative Teſtament, he muſt publiſh & declare his minde; but in a written Teſtament he may ſeal up his minde, and keep it ſecret till after his death; onely it behooves him to ſhew the ſame after it is ſealed up to ſome Witneſſes, and ſay unto them, This is my laſt Will and Teſtament; or, Herein is contained my laſt Will; and ſo let them ſet their hands to ſome part thereof, or otherwiſe to take ſuch ſpecial Notes and

Marks

Marks thereof, as that they be able to prove the ſdentity of the writing after the Teſtators death; and in ſuch Caſe it is good enough, though none of the Witneſſes were privy to the Contents thereof. *Pariſ. Conſil.* 19. *vol.*3. *numb.*25,26. &c. *Maſchar. Tract. de probat. Concluſ.* 19. 1352. *numb.*173. *Clar. ſect. Teſt. Queſt.*4. *numb.*3. *Swin.part.*1. *ſect.*11. *numb.* 6,7,8,9. *Simo.de Prætiſ.de Interpretat.ult. volun. l.*1. *f.*31.

15. As touching priviledged Teſtaments, there are three ſorts thereof; *viz. Teſtamentum Militare, Teſtamentum inter liberos, Teſtamentum ad pias Cauſas:* That is, a Teſtament made by a Souldier, a Teſtament made by a Father amongſt his Children, and a Teſtament made for good and Godly uſes. Some other there are alſo, but their priviledges are but ſmall in compariſon of theſe. *Mantica de Coniectur. ult. volun-tat. lib.*1. *Tit.*5. *num. ſeq. Swin. part* 1. *ſect.*13.

16. As

16. As to the firſt of theſe, it is obſervable among the *Civilians*, That a Souldier in Arms, and in actual ſervice of Wars, is not diſabled by any of thoſe impediments whereby others are diſabled to make their Teſtaments, except in Caſes of *Furor*, or lack of Reaſon; and for other cauſes alſo when he is diſabled *Jure gentium*. And whereas there be divers which be prohibited to be Executors or Legataries to other perſons, yet notwithſtanding they be Executors or Legataries to a Souldier, except in ſome few Caſes. And whereas alſo no other perſon can die with two Teſtaments, yet a Souldier may, and both Teſtaments ſhall be deemed good, according to the will and meaning of the Teſtator. And likewiſe whereas another perſon cannot by the Civil Law die partly Teſtate, and partly Inteſtate, yet a Souldier may. *Minſing. in Tit. de Milit. Teſtamen. Inſtituend. in principio. Fitz. Abr. Tit. Execut. num.* 26. *Franc. Mantica*

Mantica de Conject. ult. vol. l. 6. Tit. 1. num. 32. Swin. part 1. ſect. 14. Mich. Graſſ. Theſaur. com. opin. ſect. Teſtam. Queſt. 3. num. 1. Swin. part 7. ſect 11. num. 5.

17. As to the Second, where the Father maketh his Teſtament, and nameth his lawful and natural Children his Executors, and giveth them the reſidue of his Goods; to this kind there alſo belongeth ſeveral priviledges: for if there be found after the Teſtators death, two Teſtaments of divers Tenors, and it doth not appear which is firſt, nor which is laſt; in this Caſe the Teſtament made in favour of the Teſtators Children ſhall be deemed the later, and ſhall take place; whereas if neither be in favour of the Children, nor otherwiſe priviledged, then both are void; except it be in caſe of a Souldier, who by the Civil Law may die with two Teſtaments as aforeſaid. Alſo a Teſtament made in favour of Children is not ſo eaſily revoked as other Teſta-

ments

ments are: for whereas in other Teſtaments the former is revoked by the latter, and that *ipſo jure*, without any expreſs revocation; yet by the Civil Law a Teſtament among Children is not revoked by a latter Teſtament, wherein ſtrangers are preferred, unleſs it be mentioned and revoked by expreſs words; or unleſs the latter Teſtament be made *ad pias Cauſas*, or elſe ſome great Displeaſure or Enmity have happened betwixt the Father and Children, or ſome like cauſe have come to paſs, whereby it may be made appear, that the Father did repent him of the making of the ſaid Will. And laſtly, another priviledge belonging to this Teſtament, is, That if there be no Witneſſes to prove the ſame, yet if the Teſtament be found among other Writings in the Teſtators Cheſt, or like place, and undoubtedly appear to be written or ſubſcribed with the Teſtators own hand, or by him procured to be written by ſome other;

then in ſuch Caſe it is good enough: but this Priviledge alſo is allowed to all other Teſtaments here with us in *England*; as is ſhewed before in *Num.* 11. See the next Chapter, *Num.* 33, 40. *Clar. ſect. Teſt. Queſt.* 100. *Franc. Mantica de conject. ult. volunt. l.* 6. *Tit.* 2. *Swin. part* 1. *ſect.* 14. *Mich. Graff. Theſaur. commun. opin. ſect. Teſtam. Queſt.* 86. *num.* 11.

18. The third kind of priviledged Teſtaments, are thoſe which are made to pious uſes; as when one gives his Goods to be diſtributed to poor Orphans, Widows, Strangers, Priſoners, lame and diſeaſed poor perſons, or to Hoſpitals, Churches, repairing of Bridges, or the Walls of a City or Town, when the ſame be decayed and ſtand in need of repairing; and to ſuch Teſtaments belong many priviledges alſo. As firſt, it may be written with ſtrange and unaccuſtomed Characters and Notes, and yet the ſame ſhall nevertheleſs be as effectual, as if the ſame had been written af-

te

ter the uſual and accuſtomed manner. Alſo, if ſuch a Teſtament be found cancelled, and it is not known whether the Teſtator did willingly and wittingly cancel the ſame or no; in this Caſe it ſhall be preſumed to have been cancelled unadviſedly, and ſhall take effect notwithſtanding, as if it had not been cancelled at all: whereas in other Teſtaments the contrary is preſumed. And another Priviledge is, That ſuch a Teſtament is not void for incertainty (as other Teſtaments are;) and therefore if the Teſtator ſay, *I make the Poor my Executors*, or, *I Will that my Goods be diſtributed amongſt the Poor*; ſuch manner of appointing Executors or Legacies is good. Alſo if there be two Teſtaments found of divers Tenors, and it doth not appear which is laſt; in this Caſe, if one of them be made *ad pias cauſas*, that ſhall be preſumed to be laſt made, and take effect, unleſs the other Teſtament be *inter liberos*,

and then that ſhall be deemed laſt, & not the Teſtament *ad pias cauſas*. There are ſeveral other Priviledges reckoned up by ſome Authors to belong to this kind of Teſtament; for *Tiraquel. in Tract. De Privilegia piæ Cauſæ*, reckons up 170 Priviledges belonging to ſuch Teſtament; but moſt of them are here in *England* allowed to all Teſtaments, though they be not made *ad pias cauſas*. *Franc. Mantic. de conject. ult. voluntat. l.* 6. *Tit.* 3. *num.* 3. & 43. & *l.* 12. *num.* 30. *Tit.* 1. & *Tit.* 2. *num.* 25, 32. *Swin. part* 1. *ſect.* 16. & *part* 7. *ſect.* 8. *num.* 8. & *ſect.* 16. *in fin. Tiraquel. de privilegia piæ cauſæ, c.* 12, 16, & 56.

19. Unpriviledged Teſtaments are thoſe which have not any Freedom or benefit contrary to the common courſe of ordinary Law, but are tied to ſuch obſervations as the Law requireth, and hath appointed regularly for all Teſtaments. *Swin. part* 1 *ſect.* 17.

20. Now

20. Now having ſpoken ſomething of *Teſtaments Solemn* and *Unſolemn*, *Written* and *Unwritten*, *Priviledged* and *Unpriviledged*; I ſhall ſpeak a word or two of *Wills* and *Codicils*, and ſo conclude this Chapter.

21. The definition of a Laſt Will differeth but little from that of a Teſtament; for a Laſt Will is thus defined, *Ultima voluntas eſt legitima diſpoſitio, de eo quod quis poſt mortem fieri velit.* A Laſt Will is a lawful diſpoſing of that, which any one would have done after death. *Franc. Mantica de conject. ult. voluntat. l.* 1. *Tit.* 4. *num.* 18. *Swin. part* 1. *ſect.* 4.

22. There is alſo another kind of Will called a *Codicil*, and is defined after this manner, *Codicillus eſt voluntatis noſtræ juſta ſententia, de eo quod quis poſt mortem ſuam fieri velit abſq; Executoris conſtitutione.* A Codicil is a juſt Sentence of our Will, touching that which any one would have done after his death, without the appointing of an Executor: by

force of which laſt words, a Codicil is made to differ from a Teſtament; for a Teſtament can no more conſiſt or be without an Executor, then a Codicil can admit of an Executor. *Swin. part* 1. *ſect.* 5. *num.* 2. *Franc. Mantica de conject. ult. voluntat. l.* 1. *Tit.* 8. *num. Juſtinians Inſt. l.* 2. *Tit. de Codicillis, num* 2.

23. Theſe Codicils are moſt commonly made by the *Teſtator*, after he hath made his Teſtament, wherein he hath forgotten ſomething which he hath a mind to put in; and then it is done by way of Codicil, and annexed to the Teſtament: but whether it be made before or after the Teſtament, it is to be taken and reputed for parcel thereof, and ought to be performed as well as the Teſtament; unleſs being made before the Teſtament, it appear to be revoked in the Teſtament, or be contrary to that which is contained in the Teſtament. *Reformatio Legum Eccleſiaſticum Tit. de Teſtam. cap.* 5. *Swin. part* 1. *ſect.*

ſect. 5. *num.* 11. *Juſtin. Inſt. l.* 2. *Tit. Codicillis, num.* 1. *Vigel. method. Jur. Civilis, part* 4. *l.* 9. *cap.* 23. *in principio.*

24. When a Codicil is made by one that dieth Inteſtate, the Legacies therein given, muſt be paid by him that hath the Adminiſtration of the Goods of the Deceaſed, as if he were Executor. *Bro. Abra. Tit. Deviſ. numb.* 35. *Swinbor. part* 1. *ſect.* 5. *num.* 10.

25. In ſome reſpects Codicils and Teſtaments are quite contrary to one another; for whereas a man cannot die with two Teſtaments (becauſe the latter doth always infringe the former, except in ſome ſpecial Caſes) yet a man may die with divers Codicils, and the latter doth not hinder the former, ſo long as they be not contrary to one another. Alſo where two Teſtaments are found, and it doth not appear which was firſt, nor which is laſt; in this Caſe they are both void, except in ſpecial Caſes, as

is ſhewed before, *Numb.* 17, & 18. But if two Codicils be found, and it cannot be known which was firſt or laſt, and one and the ſame thing is given to one perſon in one Codicil, and to another perſon in another Codicil; here the Codicils are not void, but the perſons therein named ought to divide that thing betwixt them, by the Civil Law. *Michael Graſſ. Theſaur. commun. opinion. ſect. Codicillus. Swin. part* 1. *ſect.* 5. *in fine.*

CHAP.

CHAP. II.

What ſhall be a good Teſtament or Will, and what not.

26. THat Wills and Teſtaments may lawfully appear, it is neceſſary that there be ſufficient proof, either by writing or by witneſs; and as to that, know, that two Witneſſes are ſufficient, if they be without lawful exception. *Cowells Inſt. p.* 118. *Waterhouſe on Forteſc. fol.* 350. *Glan. l.* 7. *c.* 6. *Bract. l.* 1. *c.* 16. *Swin. part* 4. *ſect.* 21. *numb.* 2.

27. That is, if they be not perjured perſons, or perſons of infamous life, as Malefactors, or Law-breakers; or Children, Idiots, Lunatick perſons; or of the Kindred or Alliance, or Tenants or Servants to the party producing them, or Capital Enemies to the party againſt whom they are pro-

produced, or perſons who are to reap benefit by their depoſitions, or ſuch like, *&c. Cowel on Litt. fol.6. Swin. part* 4. *ſect.*21. *Maſchard. de probat. verb. princ. Concluſio* 1168. *& verb. Criminoſus, Concluſ.*469. *& verb. Furioſus Concluſ.* 828. *Swin. part* 4. *ſect.*21. *numb.*7,8,9,10. *Ref. Legum Eccleſ. Tit. de Teſtamentis, c.*17. *Waterhouſe on Forteſcue, fol.* 357 *&* and 358.

28. But if the exceptions be but ſmall, and ſuch as do but in part diminiſh the Witneſſes credit, as the exception of friendſhip, houſehold-ſervant, or ſuſpition of ſome ſmall fault, then the number may ſupply the defect; and ſo the Teſtimony of three or four Witneſſes, not altogether cleer from thoſe exceptions, is as good as the Teſtimony of two Witneſſes without all exception. *Franciſ. Mantica de Conject. ult. voluntat. lib.*6. *Tit.*3. *numb.*8. *Swin. part* 4. *ſect.*21. *numb.*3.

29. And ſometimes the Teſtimony

ny of one Witneſs is ſufficient; as where the Teſtator in his life-time commits ſomething in ſecret to ſome one perſon (being loth perhaps that any other ſhould know it) and willeth that that ſame perſon ſhall be credited for the Declaration of his Will; in ſuch caſe that perſon alone is ſufficient to prove the Contents of the laſt Will and Teſtament of the perſon deceaſed. *Olden de probation, fol.*286. *b. Swin. part* 4. *ſect.*21. *numb.* 4.

30. The Teſtimony of a Legatary alſo is allowed in probate of Wills, but not for his or their own Legacies, but for all the reſt of the Will it is good enough. *Juſtin. inſt l.*2. *Tit. de Teſt. ordinan. numb.*11. *Swin. part* 4. *ſect.*21. *numb.* 11. *Porcius in d. ſect. Legatar.*

31. But note, if a man in perfect health be demanded, who ſhall be his Executor, or have his goods after his death (which queſtion is very familiar and common amongſt companions)

nions) and forthwith he names ſome perſon, to whom he ſaith he will leave his goods after his death; This is not to be taken for a Teſtament, or laſt Will, neither is that perſon named to be admitted Executor, nor to have his goods, unleſs it be proved that the Teſtator at the time when the words were ſpoken, had *Animum Teſtandi*, that is to ſay, a full mind and reſolute purpoſe at that time to make his Teſtament or laſt Will; and this purpoſe muſt be proved by circumſtances, as wel as by words; as, that he framed himſelf very ſeriouſly to the making of the ſame, deſiring them that were preſent to bear witneſs of his Will, *&c. Juſtin. Inſt. l. 2. Tit. de Milit. Teſtamento, numb.* 1. *Swin. part* 1. *ſect.* 3. *numb.* 24. *Menoch. de Arbitrio Judicis, c.* 496.

32. Note, that the laſt Teſtament doth always make void the firſt, except in ſome ſpecial caſes, as where the latter is made through juſt fear, or by cunning and deceitful fraud or flattery

flattery, or at the importunate requeſt and deſire of another perſon, who expects to reap benefit thereby, eſpecially if the Teſtator be very ſick at ſuch time, and do it to be at quiet and reſt; in theſe caſes the latter Teſtament ſhall not make void the former; but there muſt be Witneſſes to prove theſe things, if the parties concerned intend to make void the latter Teſtament. *Menoch. de Arbitrio Jud. c.395. numb.41. Socin. Jun. Conſil.14. & 148. vol.2. numb.15. Simo. de Prætiſ. de Interpret. ult. voluntat. l.4. fol.226. numb. 49. Swin. part 7. ſect.3. Numb. 1. ſect.4. numb.3. & 6. & ſect.14. numb.3 & 5. Pariſ. Conſil.10. l.3. numb.4. Noyes Max. pag.97.*

33. Alſo if the Teſtator have made his Will, wherein he hath bequeathed ſeveral Legacies to his own Children, or to his Brothers, and afterwards makes another Will in favour of other perſons; this laſt Will ſhall not revoke this firſt, without expreſs words of revocation of the firſt Will,

as

as is ſhewed before in the firſt Chapter, *Numb.* 17. *Mich.* 2 *Car.* 1. *Eyres and Eyres Caſe in Chancery, Cro.* 1. *part Rep. fo. Swin. part.* 1. *ſect.* 15. *num.* 5.

34. But in other Wills and Teſtaments, the latter doth make void the former; albeit the firſt were a written Will or Teſtament, and the latter but a Nuncupative one, or that there were twenty Witneſſes to the firſt, and but two to the ſecond, and that *ipſo jure*, although there be no mention in the ſecond Teſtament of revoking the former; unleſs there be a Clauſe Derogatory in the former Teſtament: as where the Teſtator ſaith in the firſt, *If I make any Teſtament hereafter, I will that the ſame ſhall be of no force*; then in ſuch Caſe it is moſt ſafe and convenient in the latter Teſtament to revoke the firſt, by ſaying, *I make this laſt Will and Teſtament. Notwithſtanding that Clauſe Derogatory in my former, whereby I would that no Will or Teſtament*

ment afterward to be made by me ſhould be of any force. Vaſq. de ſucceſ. Reſoluc. l. 1. ſect. 1. num. 26. Paſc. 14 Eliz. Dyer fol. 310. Mich. Graff. Theſaur. com. opin. ſect. Teſtam. Queſt. 99. num. 4, 5. Swin. part 7. ſect. 14. num. 4. 11, 12, 13, 14, 15, 16, 17, 18. Perk. num. 478. Paul. de Caſt. Conſil. 206. Vol. 1.

35. Alſo where the Teſtator hath made two Teſtaments, a former and a latter, and afterwards lying ſick, they are both brought unto him, and being deſired to ſhew which he intends ſhall ſtand, and he ſaith, that the firſt ſhould be his Laſt Will, or if he take that of the firſt date, and deliver it for his laſt Will; then in ſuch Caſe that Will ſhall ſtand, and the other ſhall be void. *Perkins num. 479. Mich. 44 E. 3. fol. 33. Pacis Conſultum pag. 81.*

36. Likewiſe if an Executor be named in the firſt Teſtament, and none in the ſecond Will, then the firſt Teſtament ſhall ſtand, and the lat-

as is ſhewed before in the firſt Chapter, *Numb.* 17. *Mich.* 2 *Car.* 1. *Eyres and Eyres Caſe in Chancery, Cro.* 1. *part Rep. fo. Swin. part.* 1. *ſect.* 15. *num.* 5.

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ment afterward to be made by me ſhould be of any force. Vaſq. de ſucceſ. Reſoluc. l. 1. ſect. 1. num. 26. Paſc. 14 Eliz. Dyer fol. 310. Mich. Graſſ. Theſaur. com. opin. ſect. Teſtam. Queſt. 99. num. 4, 5. Swin. part 7. ſect. 14. num. 4. 11, 12, 13, 14, 15, 16, 17, 18. Perk. num. 478. Paul. de Caſt. Conſil. 206. Vol. 1.

35. Alſo where the Teſtator hath made two Teſtaments, a former and a latter, and afterwards lying ſick, they are both brought unto him, and being deſired to ſhew which he intends ſhall ſtand, and he ſaith, that the firſt ſhould be his Laſt Will, or if he take that of the firſt date, and deliver it for his laſt Will; then in ſuch Caſe that Will ſhall ſtand, and the other ſhall be void. *Perkins num. 479. Mich. 44 E. 3. fol. 33. Pacis Conſultum pag. 81.*

36. Likewiſe if an Executor be named in the firſt Teſtament, and none in the ſecond Will, then the firſt Teſtament ſhall ſtand, and the lat-

latter ſhall be added only by way of Codicil. *Vigel. Method. Jur. Civilis part* 4. *lib* 9. *c.* 23. *in princip. Swin. part* 7. *ſect.* 14 *num.* 5.

37. Where it is ſaid before, that where Lands are deviſed, the will muſt be in writing, and done in the life-time of the Teſtator; yet if the Clerk be skilful in the Law, and takes Notes from the mouth of the Teſtator, for the deviſe of Lands, Tenements and Hereditaments, and afterwards proceeds to write the ſame in Form; but before it be finiſhed or ſhewed to the Teſtator, he departs this life; yet this is held and adjudged a good Will in writing, within the Statute of 32 *H.* 8. to convey Lands, Tenements, or Hereditaments. *Mich.* 6 *E.* 6. *Sackvil and Browns Caſe. Dyer, fol.* 72.

38. Alſo a written VVill done in the life-time of the Teſtator, or by Notes as aboveſaid, is good to convey Lands, though it be unſealed or unſubſcribed, nor no Executor named therein;

therein; and ſuch a Will which only concerns the bequeathing of Lands, Tenements, or Hereditaments, ought to be proved in the Chancery. *Hill.* 22 *Car.* 1. & *Paſch.* 23 *Car.* 1. *B. R. Styles Regeſt. practicale, p.* 357. *Pacis Conſultum, p.* 80. *Noye's Maximes pag.* 97.

39. If the Teſtator after he hath begun his Will, and before he have finiſhed it, be ſuddenly ſtrucken with Death or Inſanity of mind, or ſome other impediment, ſo that he cannot finiſh the ſame; or if he have begun the ſame, and deferreth the finiſhing thereof till ſome other time, and in the mean time dieth, or otherwiſe becometh Inteſtate: In theſe Caſes, though it ſeem by the Civil Law that ſuch Teſtaments are void wholly; yet by the Law of Nations, and with us here in *England*, ſuch Teſtaments are good for ſo much as is therein already bequeathed. *Michael Graſſ. Theſaur. com. opinion. ſect. Teſtament. Queſt.* 12. & 19. *Maſcha. de Proba. verb.*

Teſta. Concluſ. 1352. *numb.* 70. *Swin. part* 7. *ſect.* 12. *numb.* 4, 9, & 10. *Pacis Conſul. p.* 81. *Simo. de Prætiſ. de Interp. ult. voluntat. l.* 1. *fol.* 195.

40. It there be two Teſtaments found, and it cannot be known which of them was firſt made, nor which was laſt made; in this Caſe they are both void, unleſs one of them be made in favour of the Teſtators children, or thoſe who after his death are of right to have Adminiſtration of his Goods, if he had died Inteſtate; and the other Teſtament made in favour of Strangers; and then in ſuch Caſe the Teſtament made in favour of the Children or Friends, &c. ſhall prevail and ſtand good, as is ſhewed before in the firſt Chapter, *numb.* 17. *Franciſ. Mantica, de conject. ult. voluntat. l.* 2. *Tit.* 15. *num.* 17. *Swin. part* 1. *ſect.* 15. *num.* 2. & *part* 7. *ſect.* 11. *num.* 2.

41. Or if one of the Teſtaments be made *Ad pias cauſas*, and the other not, then the Teſtament *Ad pias*

cauſas

cauſas ſhall prevail, unleſs the other be *Inter liberos* amongſt the Teſtators Children, and then it ſhall prevail, and not the Teſtament *Ad pias cauſas*, as is ſhewed before in the firſt Chapter, *Num* 18. *Franciſ. Mantica de conjectura ult. volunt. l* 6. *Tit.* 3. *num.* 43. *Swin. part* 1. *ſect.* 16. *num.* 7. *& part* 7. *ſect.* 11. *num.* 6.

42. Alſo where there are two Teſtaments, and one of them is proved before the Ordinary, *&c.* and the Executors are entered to the poſſeſſion of the Goods, and then the other Teſtament is found, and it cannot be known which was firſt made, nor which was laſt made; in this Caſe the Teſtament already proved ſhall ſtand, and the Executors ſhall not be diſpoſſeſſed of the Goods by means of the other Teſtament of the ſame Date. *Sichar. in D. lib. ult. Swin. part* 7. *ſect.* 11. *num.* 4.

43. If a man be ſo extreme ſick, that he is almoſt at the point of Death, and can ſcarce ſpeak; yet if

he be of good underſtanding and ſound mind, as may appear by his Geſtures and ſenſible Speeches; in ſuch Caſe he may make his Teſtament, ſo as it come of his own accord, and not at the earneſt requeſt or importunity of his Wife, or ſome covetous perſon, who expects and greedies after benefit by the ſame. *Franc. Mantica de conject. ult. volunt. l. 2. Tit. 6. num. 5, 9, & 10. Socin. Jun. Conſil. 183. vol. 2. num. 27, 31, 34, & 39. Mich. 1654. B. R. Hatcher & Newborns Caſe. Styl. Regeſt. Practicale, p. 359. Swin. part 2. ſect. 25. num. 2, 5, 6, & 7. Simo. de Prætiſ. de Interp. ult. volunt. lib. 2. Dub. ult. Soluc. 4.*

44. If the friends of ſuch a ſick man, or any other perſons, do without his knowledge prepare a Will in writing, and bring it to him, and read it, and aſk him if that ſhall ſtand for his Teſtament, and he anſwers, *Yea*, and immediately after dieth; in this Caſe ſuch Teſtament is not good, unleſs the Teſtator had firſt uttered his mind

mind to the Writer or Inditer thereof, or had requeſted them to write his Will; or unleſs the Teſtator being of perfect mind and memory, had by plain and expreſs words, or other apparent conjectures, confirmed the ſame, and not only by anſwering, *Yea. Franc. Mantica de conject. ult. volunt. l.* 2. *Tit.* 6. *num.* 10. *Swin. part* 2. *ſect.* 25. *num.* 11. *Gabr. l.* 4. *commun. concluſ. Tit. de Teſtam. concluſ.* 2. *num.* 13, *&* 17.

45. If a man through juſt fear and conſtraint of ſome other perſon, do make his Teſtament, ſuch a Teſtament is void, eſpecially when afterwards the Teſtator declareth, *That he would gladly alter his Teſtament, but for fear of ſuch a perſon*; and then ſuch Teſtament is void, at leaſt, as to ſuch a perſon by him named, of whom he is afraid. *Mich. Graff. Theſaur. com. opin. ſect. Teſtament. Queſt.* 23. *num. Swin. part* 7. *ſect.* 2. *numb.* 1. *&* 10.

46. But here it is left to the diſ-

cretion of the Judge, who ought not only to conſider the quality of the threatning, but alſo the perſons as well threatned as threatning; and in the perſons threatned, the Sex, the Age, or Courage, or Puſillanimity; and in the perſon threatning, the power, the diſpoſition, and whether he be a meer Boaſter, or performer of his threats. *Menoch. de Arbit. Judic. Caſus* 135. *Maſchar. de Probat. Concluſ.* 1054. *Swin. part* 7. *ſect.* 2. *numb.* 7.

47. Alſo a Teſtament made by fraud is void, unleſs the deceit of fraud be very ſmall, ſuch as would not deceive any rational man or woman; or that the fraud be not evil, as where the Teſtator intending to beſtow all his goods on ſome vile perſon, omitting his honeſt Wife and Children; here if the Wife and Children do perſwade him that ſuch perſon is dead, or by ſome means deceive the Teſtator, and procure themſelves to be made Executors, then this is not to be repelled as an unlawful Teſtament.

ment. *Bald. in d. lib. 1. numb.* 17. *Swin. part* 7. *ſect.* 3. *numb.* 2.

48. Though a man have ſworn not to make a Teſtament, yet notwithſtanding he may lawfully make one; and if he have made one, & ſworn not to Revoke it, yet he may afterwards make another, and revoke the firſt: but then it is convenient, that he revoke his Oath alſo, and ſay, I make this my laſt Will and Teſtament, notwithſtanding my former Teſtament, with the Oath therein contained not to revoke the ſame. *Mich. Graff. Theſaur. com. opin. ſect. Teſtament. Quæſtio* 87. *Jul. Clar. ſect. Teſtament Quæſtio* 94. *Swin. part* 2. *ſect.* 24.

49. It is neceſſary to the validity of a Teſtament, that the Teſtator have Ability to make a Teſtament, not only at the time of the making thereof, when the Teſtament receiveth his eſſence or being; but alſo at the time of the Teſtators death, when the Teſtament receiveth his ſtrength and confirmation: And therefore if a wo-

man make her Teſtament, and then marry, and die during marriage, ſuch Teſtament is void; or if ſhe make a Teſtament during marriage, and overlive her Husband, and then die, yet the Teſtament is void: but if ſhe make her Teſtament before marriage, and overlive her Husband, and then die, in ſuch Caſe the Teſtament is good; or if it were made during marriage, and after her Husbands death, ſhe doth approve and confirm the ſame, and then die, in ſuch Caſe alſo it is held to be good. *Plo. Com. fol.* 343. 37. *Eliz. C. B. Forſe & Hemlings Caſe, Co.* 4. *lib. Rep. fol.* 60. *Swin. part.* 2. *ſect.* 9. *num.* 4, 5, 6.

50. A Codicil may be added by Parol to a VVill in writing, and this Parol Codicil ſhall be put in writing, and affixed to the VVill as a Codicil; and this may as well be done, as a VVill in writing may be revoked by Parol. *Hill.* 22 *Car.* 1. *& Paſc.* 23 *Car.* 1. *in B. R. Styles Regeſt. Practicale, p.* 357. *& Paſc.* 14 *Eliz. Dyer, fol.* 310.

51 If

51 If the Teſtator make his VVill by Parol, which is afterwards put by another into writing, and he put more in then the Teſtator did expreſs; yet it is good, as to ſo much as can be proved was expreſſed by the Taſtator by Parol, and the reſt is void. *Paſc.* 24 *Car.* 1. *B. R. Styles Regeſt. Practicale, p.* 357.

52. One went beyond Sea, and wrote back a Letter that his Land ſhould go in ſuch manner, and it was adjudged to be a good Will and Deviſe of his Land. *Abr. Moors Rep. p.* 63. *pl.* 299. *Weſts Caſe.*

53. If the Teſtator being of ſane Memory, deſire another perſon to ſet his Hand and Seal to his Will for him, and he does ſo; this is a good Will, though the Teſtator did it not himſelf. *Paſc.* 1650. *B. R. Styles Regeſt. Practicale p.* 358.

54. If a Parol Will be put in writing, and is afterwards embezelled, loſt, or deſtroyed; yet the Will is not thereby deſtroyed, if it can be proved

ved by Witneſſes: but if it come in queſtion, whether a Will be good or not, in ſuch Caſe proof doth not avail; for matter of Law is to be decided by the Judges, and not by Witneſſes nor Juries: *Ad quæſtionem Facti non reſpondent Judices, Ad quæſtionem Juris non reſpondent Juratores. Hill.* 22 *Car.* 1. *Paſc.* 24 *Car.* 1. *B. R. Styles Regiſt. pract. p.* 357,358. *Cowel on Litt. fol.* 155. *b.*

55. If a Teſtament bear date at *Cane* in *Normandy*, and be proved in *England*, it is good enough for the Executor to bring an Action upon. *Perkins, numb.* 494.

56. Note that a man may dye partly Teſtate, and partly Inteſtate by the Laws of this Realm, though it's contrary to the Civil Law: and this he may do, not onely in reſpect of time, but alſo in reſpect of goods and place: for if a man have goods in diverſe Dioceſſes, he may make Executors of his goods in one Dioceſs, and dye Inteſtate as touching his goods in

in another Dioceſs; or, if a man make one Executor particularly of a certain portion of his goods, the Executor is onely ſo far chargeable with the payment of the Debts and Legacies of the Teſtators, as the portion of the goods to him allotted do extend unto; and as touching the reſidue of the Teſtators goods, if there be not another Executor appointed, then for ſuch goods he is ſaid to dye Inteſtate, and Adminſtration may be taken of them. *Bro. Executor. numb.*2. & 154. *F. N. B. numb.*26. *eod. Tit. Plo. Co. fol. In Fox and Griesbies Caſe. Swin.part* 4. *ſect.*18. *numb.*4.

CHAP.

CHAP. III.

Who may make a Teſtament, and who not.

57. EVery perſon, both man and woman, Chriſtian and Jew, ſound or ſick, and generally of what Eſtate or Condition ſoever he or ſhe be of, hath full power and liberty to make a Teſtament, or laſt Will, and may therein diſpoſe of their goods and Chattels; ſaving ſuch perſons as be prohibited by Law or Cuſtom, as hereafter followeth. *Mich. Graſſ. Theſaur. com. opin. ſect. Teſtament. Quæſtio* 20. *numb.* 1. *Swin. part* 2. *ſect.* 1. *numb.* 1.

58. By the Stat. 34 *H.*8. Wills or Teſtaments made by any perſon within the Age of twenty one years, of any Mannors, Lands, Tenements, or other Hereditaments, is not good nor

nor effectual in the Law; for till that Age, by the Common Laws of this Realm, they are accounted Infants. 34, 35 *H.*8. *c.*5. *Wingate Abr. Stat. Tit. Will. numb.*22. *Dr. & Stud. l.*1. *c.*21. *& l.*2. *c.*28. *Swin. part* 2. *ſect.*2. *numb.*1.

59. But a Boy of fourteen, and a Girl at twelve years of Age, by the Civil Law, may make their Wills and Teſtaments of their Goods and Chattels; and that not onely without the authority or conſent of their Curator or Guardian, but alſo without the authority and conſent of their Parents; and though it be made but in the very laſt day of fourteen or twelve years, yet it is good enough; but before that age it is not good, although the Boy were a Souldier, or that the Teſtament were made *Ad pias Cauſas*, or with conſent or authority of the Tutor. *Mich. Graff. Theſaur. com. opinion. ſect. Teſtament. Quæſtio* 20. *Perkins, numb.* 503. *Cowels Inſtit. p.* 122. *Swinbor-*

part

part 2. ſect. 2. num. 6, 7, 8. Noyes Max. pag. 97.

60. Mad folks and lunatick perſons, during the time of their *Furor* or inſanity of mind, cannot make a Teſtament, nor diſpoſe any thing by Will, no not *ad pias cauſas*; nay, though they come to their perfect underſtanding afterwards, yet this doth not make the Teſtament to take any effect, which was made during ſuch *Furor*: but if theſe mad or lunatick perſons have clear or calm intermiſſions, then during ſuch time, they may make their Teſtament, and appoint Executors, and diſpoſe of their Goods at their pleaſure; and the *Furor* going before the making of ſuch Teſtament ſhall not prejudice it. *Reformat. Leg. Eccleſiaſtic. Tit. de Teſtament. cap. 7. Pacis conſultum, p. 80. Mich. Graff. Theſaur. com. opin. ſect. Teſtam. Queſt. 2. 17. Swin. part 2. ſect. 3.*

61. Alſo if a man of ſound memory, who was never taken with any Lunacy

Lunacy or Inſanity of mind, do make his Teſtament of his Goods or Lands, and afterwards is taken with Lunacy or Inſanity of mind, a little before his death (which often happens through the extremity of their ſickneſs) yet this doth not hurt the Teſtament which was made before: or if a lunatick perſon, or one that is beſides himſelf ſometimes, make his Teſtament, and it is not known whether the ſame were made when he was of ſound mind or no; in this Caſe, if no Argument of Frenzy or Folly appear in the ſame, then it ſhall be conceived to be made in his calme Fit, and ſo adjudged a good Teſtament. But on the contrary, if any Folly appear in the ſame, though it be but two or three words, as if he ſay, *I Peter*, when his name is *John*; then it makes the Teſtament void, as being preſumed to be made during the inſanity of mind. *Mich. Graſſ. Theſaur. com. opin. ſect. Teſtam. Queſt.* 21. *Vaſq; de ſucceſſ. progreſſ. lib.* 1. *ſect.* 1. *num.*

1.*num.*90. See *Co.* 4. *lib. Rep. fol.* 61. *Swin. part.* 2. *ſect.* 3. *num.* 4. 14, & 15.

62 Note that every perſon is preſumed to be of ſound mind, unleſs the contrary be proved; and therefore thoſe that intend to make void a Teſtament by reaſon of inſanity of minde, muſt prove the ſame impediment; and if it be proved that the Teſtator was beſide himſelf before the making of the Teſtament, although they do not prove him to be mad at the very time of making the Teſtament, yet it is ſufficient, and it lies on the Executors part to prove that the Teſtator was of ſound mind, not onely to anſwer to ordinary and uſual queſtions, but that he had a diſpoſing memory, and was able to make his Deviſes and Bequeſts with underſtanding and reaſon, at the time of making his Teſtament. *Franciſc. Mantica de conject. ult. volunt. l.*1. *Tit.*5. *Maſchard. de Probat. verb. Furioſum, Concluſ.* 824. *numb.* 10.

Vide

Vide 41 *Eliz. B. R. in Marqueſs de Wincheſter's Ca. Co. 6. Li. fo.* 23. *Swin. part* 2. *Sect.* 3. *Num.* 6, 7.

63. An Idiot or Natural Fool, that cannot number Twenty, nor tell his Age, nor is able to anſwer to any ordinary and uſual Queſtion, nor knows what is for his advantage or damage, though it be notorious, nor is apt to be inſtructed or informed by any other; ſuch an one cannot make a Teſtament, nor may diſpoſe either of his Lands or Goods. *F. N. B. de Idiota inquirendo.* 34 *H.* 8. *c.* 5. *Cowels Inſt. p.* 123. *Simo. de Prætiſ. de Inter. ult. volunt. lib.* 2. *dub.* 1. *fol.* 4. *Swin. part* 2. *ſect.* 4. *num.* 1, 2.

64. But if a man be of a mean underſtanding, between a Wiſe-man and a Fool, ſuch an one may make his Teſtament; unleſs he be ſo ſimple, as that one may perſwade him to believe things impoſſible, as that an Aſs can flie, or that in old time Trees did walk, and Birds ſpeak, or the like. *Simo. de Prætiſ. de Inter.*

ult. volunt. lib.2. dub.1. fo.4. Swin. part 2. ſect.4. num.3,4.

65. A Married woman cannot make her Teſtament of any Mannors, Lands, Tenements or Hereditaments, by the Statute of 34 *H.* 8. neither can ſhe make a Teſtament of Goods or Chattels without her Husbands licenſe; except ſhe be a Queen or Empreſs, or that ſhe were Executrix to ſome other perſon: for in ſuch caſe ſhe may make her Will of ſuch Goods as ſhe hath as Executrix, without his licenſe; and name her Executor, who ſhall have them to the uſe of the firſt Teſtator; but ſhe cannot give them away as a Legacie: and if ſhe die without Will, yet in ſuch caſe, ſuch goods as ſhe had as Executrix (of which the property is not altered) ſhall not go to the Husband, but Adminiſtration thereof ſhall be committed to the next of kin of the firſt Teſtator. But in both theſe caſes, the Husband ſhall have the Profits ariſing of the ſame, as Calves, Lambs, and

and ſuch-like profit of Kine and Sheep. Alſo if the Wife have Goods by way of Legacie from another perſon, in ſuch caſe ſhe cannot make a Teſtament, or diſpoſe of the ſame, without his licenſe. Note, though the Husband do give licenſe to the Wife to give away part of his goods, yet notwithſtanding he may countermand her Teſtament again, either before or after her death, or at leaſt before the Probate thereof. But if the wife make her Teſtament of his Goods, and the Executors prove the ſame, and the Husband delivers the Goods to the Executors; then he cannot countermand the Teſtament, though the wife made it without his licenſe or knowledge: for by this after-act the Law preſumes he gave conſent at the firſt. 34, 35 *H.* 8. *c.* 5. *Bract. l.* 2. *c.* 26. *Bro. Deviſe* 34. *Teſtament* 21. *Executor* 11. *& Adminiſtrator* 45. *Perkins num.* 501 *&* 502. *Noys Maxims p.* 97. *Mich.* 2 E. 2. *Deviſe* 14. *F. N. B. tit. Executor, num.* 10. *Swin.*

part 2. ſect. 9. Plo. com. fol. 525. Cowels Inſt. pa. 124.

66. A Slave or Bondman cannot make a Teſtament or Will, for that all he hath is his Lords, and he can diſpoſe of nothing. *Bract. l. 1. C. 9. num. 3. Fleta li. 1. C. 5. ſect. 7. num. 3. & Cowels Inſt. pa. 16.*

67. But if a Villain make a Teſtament, it is not abſolutely void, but voidable: for if the Lord enter, and ſeiſe the Villains Lands and Goods before probate of the Will, it makes the Deviſe void; or if he claim the Villain in his life-time, and ſeize the Goods by word onely, it makes the Deviſe void. But if neither of theſe were done by the Lord, before the Executors prove the Will and ſeize the Goods, then the Teſtament of the Villain is good in law againſt the Lord; except it be in caſe of the King: for if his Villain give or ſell his Goods, the King may ſeize them at any time; for, *Nullum tempus occurrit Regi.* Alſo if a Villain have

Goods

Goods as Executor to another perſon, he may make a Teſtament thereof, and appoint an Executor to the firſt Teſtator, who ſhall have the ſaid Goods, and not the Lord of the Villain. *Bro. tit. Villenage*, 50, 68, 73. *Dr. & Stud. li.2.C.43. Littletons Tenures, li. 2. C. 11. & Swin. part 2. ſect. 7.*

68. A man that is taken captive by thoſe who are open enemies to the King, cannot make a Teſtament during his captivity: for if he do, though he ſhould eſcape afterwards, and then die, yet ſuch Teſtament is void: but if he had made a Teſtament before he was taken, and then afterwards eſcape; or though he die during his Captivity, yet in both caſes the Teſtament is good; and ſo it is if he be taken by thoſe who are not proclaimed enemies, and during his captivity he makes his Teſtament: or if a man who is impriſoned for Debt do make his Teſtament during his impriſonment, it is good, unleſs

it be made in favour of thoſe at whoſe Suit he is impriſoned. *Mich. Graff. Theſaur. com. opin. ſect. Teſtament, Quæſtio* 25. *Franc. Mant. de conject. ult. Volunt. li.* 2. *tit.* 7. *num.* 2. *& Bract. li.*2. *C.*16. *num.*5. *Swin. part* 2. *ſect.*8.

69. One that is born Deaf and Dumb, if it appear by ſufficient Argument that he underſtands what a Teſtament is, may by ſignes make a Teſtament; and ſo may any one that could have ſpoken and heard formerly, and is become deaf and dumb by ſome accident: or if ſuch perſon can write, then he may write his Teſtament with his own hand: and ſo likewiſe may one do that can hear, but cannot ſpeak: and if he cannot write, then he may do it by ſignes and tokens: and one that can ſpeak, but cannot hear, may alſo make his Teſtament, and deviſe his goods to whom he pleaſes. *Refor. leg. Eccleſ. tit. de Teſtam. C.*7. *Swin. part* 2. *ſect.* 10.

70. But

70. But one that is born both deaf, dumb and blinde, cannot make a Teſtament or Will, becauſe he hath no underſtanding. *Finches law, li.2.C.2. pa.103. Perkins numb.25.*

71. One that is blinde may make a Nuncupative Teſtament, by declaring his Will before a ſufficient number of witneſſes: but he cannot make his Teſtament in writing, unleſs the ſame be read before witneſſes, and then acknowledged by him to be his laſt Will and Teſtament: for if he ſhould acknowledge a writing for his laſt Will, and do not hear it read, this will not make it amount to a VVill in writing. *Swin. part 2. ſect.11. & num.1,2.*

72. He who is lawfully convicted of High-treaſon, by Verdict, Confeſſion, Outlawry or Preſentment, cannot make his Teſtament, or diſpoſe of any Goods, Lands, Tenements or Hereditaments; nay, though he have made a Teſtament before ſuch conviction, yet the ſame is void:

but if he afterwards obtain the Kings pardon, then he may make a Teſtament; or if he have made one before conviction, then after ſuch pardon the ſame becomes good again. *Cowels Inſt. pa.* 123. 5 *E.* 6. *C.* 11. *Swin. part* 2. *ſect.* 12.

73. He who is indicted of Felony at the Kings ſuit, and will not plead to the Indictment, but ſtands Mute, ſhall be preſſed to death, and forfeits all his Goods, but not his Lands; and ſo it is ſaid he may in ſuch caſe make his Teſtament of his Lands. *Swin. part* 2. *ſect.* 13. *num.* 5. *Dr. & Stud. li.* 2. *C.* 41. *Fulton de pace Regis, fo.* 216.

74. Thoſe who are indicted and lawfully convicted of ſuch Crimes as are Felony, (as Petty Treaſon, Murder, Homicide, Chancemedly, Burglary, Robbery, Theft, Buggery, Rape, *&c.*) after their conviction can make no Teſtament, nor diſpoſe of any Lands, Goods or Chattels of their own; nay, if they have made a Te-

a Teſtament before, ſuch conviction makes it void, unleſs they procure the Kings pardon, and be reſtored to their firſt condition again: but if one be attainted of Felony onely, he may give away his goods by Deed of Gift, or ſell them, before Judgment be pronounced; but for Lands, the Law takes notice from the time of the fact committed and compriſed in the Indictment; but it is otherwiſe in caſe of Goods and Chattels. *Mich. Graſſ. Theſaur. com. opin. ſect. Teſtament, Quæſtio* 26. *Dr. & Stud. lib.* 2. *C.* 41. *Bro. forfeiture*, 5, 28, 65 89, 103, 113, 117. *Swin. part* 2. *ſect.* 13. *Stamf.* 192. 33 *E.* 3. *tit.* 20. *Perkins num.* 29, 41. *Aſſ. pl.* 31. *Cowels Inſt. pa.* 123 & 124. *Dalton fo.* 292. *C.* 110. *Vide Co. on Lit. ſect.* 745. *Raſtal, Forfeiture* 7. *Wingate Abr. Stat. eod. titulo, num.* 5 & 8. *Stat. de Catallis Felonum*, & 1 *R.* 3. *c.* 3. *Paſch.* 8 *E.* 4. *fo.* 4. *a. Kitchin Court-leet, fo.* 42. *a.*

75. By our ancient Law, an Here-

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tick could not make a Teſtament (after conviction) of his goods and chattels: and if he were delivered over to Lay-mens hands, then he forfeits his Lands alſo. But ſee now the Statute of 1 *Eliz. c.* 1. for by that Statute, the 2 *H.* 5. *c.*7. which gave Forfeiture of goods and lands in caſe of Hereſie, ſtands now Repealed; ſo that we have nothing in certain now, but what we receive from the Canon-law. A Relapſe into Hereſie after Recantation, is fatal. *Mich. Graſſ. theſaur. com. opin. ſect. Teſtam. quæſt.* 24. *Cowels Inſt. p.*124. *Swin. part* 2. *ſect.*14. *Dr. & Stud. li.*2. *C.*29. 2 *H.* 5. *C.*7. 1 *Eliz. C.*1. *Co.*3 *part Inſt. fo.* 43. *C. Hereſie. Reformatio Leg. Eccleſiaſticum, tit. de Teſt. c.*7.

76. He who hath been condemned, or publickly confeſſed himſelf to be a manifeſt Uſurer, and publickly uſes the ſame Trade, and hath exacted above Ten pounds in the Hundred for the loan or forbearance of an Hundred pounds for one year, cannot

not make a Teſtament of his Goods and Chattels, unleſs he ſatisfie or make reſtitution for the ſame in his life-time, or enter caution for ſatisfaction to be made after his death. *Menoch. de Arbit. Judic. li.2. caſus* 235. *Swin. part* 2 *ſect.* 16. *Fleta li.*2.*C.*50. *Cowels Inſt. pa.*124. *Mich. Graff. theſaur. com. opin. ſect. Teſtament. quæſt.* 33. 13 *Eliz. c.*8. *Refor. Leg. Eccleſ. tit. de Teſtamentis, c.*7.

77. If one make a Teſtament of his goods or cattel, and afterwards wittingly and willingly kill or hang himſelf; then ſuch Teſtament is void; for his goods and chattels real and perſonal are all forfeited to the King, and all debts due to him by Specialty, but no debts due to him without Specialty, or upon Simple contract. *Stamf. pl Coronæ, li.*1. *c.*3. *Bract. li.*3 *c.*2. *Cowels Inſt. pa.*124. *Swin. part* 2 *ſect.*20. *Co.* 3 *part Inſtit. fo.*54. 3 *E.*3 *Coron.*301. 8 *E.* 2. *Coron.*420. *Paſch.* 8 *E.*4. *fo.*4. *a. Dyer fo.*262. *Daltons Juſt. fo.*236. *c.*92.

78 If

78. If one who is Outlawed in a Perſonal Action, make his Teſtament of his goods, and the Executors prove the Teſtament, and afterwards ſue the Debtors of the Teſtator, who plead Outlawry in the Teſtator as a Bar; this hath been held as no good Bar, ſo that before ſeiſure they may ſue: but if the King ſeize the goods as forfeited, though he give them back again to the Executors, yet they ſhall not be Aſſetts in their hands to charge them with any debts or Legacies of the Teſtators. *Trin. 37 Eliz. C. B. Rot. 1306. Woolly and Bradwels caſe. Brownlows 1 part Rep. fo. 55. Mich. 20 Jac. C. B. Bullen and Gerviſe caſe. Huttons Rep. fol. 53. Dr. & Stud. li. 1. c. 6.*

79. He who is ſo exceſſively overcome with drink, as that he is utterly deprived of the uſe of Reaſon and Underſtanding, at ſuch time cannot make a Teſtament: but if he be not clean ſpent, albeit his Underſtanding be a little darkned and obſcured,

ſcured, and his Memory troubled, yet he may make his Teſtament in that caſe. *Simo. de Prætiſ. de Inter. ult. Voluntat. li. 2. dubium 1. ſolut. 4. num. 22. Swin. part 2. ſect. 6.*

80. Archbiſhops, Biſhops, Deans, Archdeacons, Prebendaries, Parſons, Vicars, and other Eccleſiaſtical Miniſters or Clergie-men, may make their Teſtaments of all ſuch goods and chattels as they ſeverally enjoy in their own right, and not in the right of their Churches and Eccleſiaſtical Livings. *Perkins num. 496, 497, 498 28 H. 8. c. 11. Mich. Graſſ. theſaur. com. opin. ſect. Teſtament. quæſtio 34. Cowels Inſt. pa. 125. Swin. part 2. ſect. 26. Dr. & Stud. li. 2. c. 39.*

81. The King, however in a capacity to make a Will, cannot make a Teſtament, and thereby give away his Kingdom and Crown-Jewels or *Regalia* from his lawful Heirs to another. *Fitz. Abr. Deviſe 5. Ex. 108 Cowels Inſt. pa. 125. Swin. part 2. ſect. 27.*

82. The

82. The Queen of *England* is an exempt perſon from the King, and may make a Teſtament; and is of ability and capacity to grant, and to take, to ſue and be ſued, as a *feme ſole* by the Common Law. *Co. on Lit. fo.* 134. *ſect.* 200. *Finches law, li.* 2. *c.* 1. *p.* 86. *Co.* 4 *lib. fo.* 23. *in Clark and Pennyfathers Caſe.*

83. When one is grown ſo old, as that he is become a Childe again in his underſtanding, and is deprived not onely of Reaſon, but alſo of Senſe almoſt; or grown ſo forgetful, (through Age or other infirmity) that he hath forgotten his own Name; ſuch perſon can no more make a Teſtament then a Childe. *Fran. Mantica de conject. ult. Volunt. l.* 2. *tit.* 15. *num.* 16. *Simo. de Prætiſ. de interp. ult. Volunt. li.* 2. *dub.* 1. *ſol.* 4. *num.* 22. *Swin. part* 2. *ſect.* 5.

84. An Excommunicate perſon may make his Teſtament; unleſs he be excommunicate for Hereſie or manifeſt Uſury, or ſome other cauſe for

for the which he is prohibited to make a Teſtament; or unleſs he be excommunicate with that great Curſe which is called *Anathema*, and is not inflicted but upon great cauſe. *Swin. part* 2. *ſect.* 22. *Mich. Graſſ. theſaur. com. opin. ſect. Teſtament. quæſtio* 24.

85. By the Civil Law, ſuch as marry within the Levitical degrees, and prohibited to marry by Gods Law, cannot make a Teſtament, or diſpoſe of any goods or chattels to their children begotten in ſuch Inceſtuous Marriage; unleſs it be ſo much only as will ſerve for their competent ſuſtentation or maintenance; or that they be appointed but bare Executors, without any other benefit: or if the Parents were ignorant of the impediment of ſuch Conſanguinity or Affinity, then the children born during ſuch ignorance, by the Eccleſiaſtical Canons are capable of all Legacies, and all manner of Teſtamentary benefits, as legitimate, albeit the

the parents afterwards ſhould be divorced. Obſerve alſo, that as the inceſtuous perſons aforeſaid cannot make a Teſtament, or diſpoſe of any goods to their inceſtuous children: ſo neither can they deviſe their goods to any other, except it be to their parents, or brother or ſiſter, or uncle or aunt, or to ſuch children as were begotten in lawful Marriage by a former wife, if they had any.

86. Several other perſons there are who fall under Eccleſiaſtical cenſures, and are prohibited by that Law to make a Teſtament; but being that they are not deprived of this priviledge by our Common or Statute-Laws (which limit the power of the Eccleſiaſtical Courts within this Kingdom) I ſhall omit therefore to mention them; and ſo conclude this Chapter.

CHAP.

CHAP. IV.

Who may be an Executor, and who not.

87. NOte, that every perſon may be an Executor, and is capable of a Legacie; ſaving ſuch perſons as are prohibited by Law: yea, in ſome caſes thoſe who cannot make a Teſtament or Will, may be Executors; as a childe in the mothers womb, an Infant, a Married woman, a Bondman or Villain; and in ſuch caſe the Villain may have an Action againſt his own Lord, if he were indebted to the Teſtator. *Lit. lib. 2. c. 11. Bro. Abr. tit. Villenage 68. & tit. Executor. Cowels Inſt. p. 129. Glan. lib. 7. c. 6. Old Tenures, tit. Villenage. Fra. Mantica de com. ult. Volunt. li. 4. tit. 8. Swin. part 5. ſect. 1.*

88. And if the Teſtator make his

own Villain Executor, he doth thereby manumit and free him from Bondage. *Cowels Inst. p.*13. *Bract. l.*4. *C.*21. *Co. on Lit. fo.* 136.

89. Note, that if he who is named Executor be an *Apostata*, or an Heretick, either at the time of the making the Testament, or at the time of the death of the Testator, or at the time when he would undertake the Executorship; in all these cases he is to be excluded, by the Civil Law. *Sichard. in Rubr. de Hæred. Instit. C. num.* 5. *Mich. Graff. thesaur. com. opin. sect. Instit. quæst.*28. *Swin. part* 5. *sect.*2,3.

90. He who is convicted of Treason or Felony, is incapable of an Executorship or Legacie: but if he were attainted of Felony, and afterwards admitted to his Clergie, then he may be an Executor, *&c. Mich. Graff. thesaur. com. opin. sect. Inst. quæst.*5. *Labrig. des Cases edit. anno Dom.* 1599. *fo.*180. *num.*13. *Swin. par.* 5. *sect.*4.

91. An

91. An Outlawed perſon, ſo long as he ſtandeth in that caſe, is not to be admitted to the Executorſhip, nor can ſue for his Legacie: but though the Ordinary do not admit him, yet if he ſhall Adminiſter as Executor, becauſe it is to the uſe of another, it is held to be good in Law. But if the Teſtator bequeath the reſidue of his goods, or ſome Legacie, to the Executor being an Outlawed perſon, the ſame is forfeited and confiſcate by force of the Outlawry. *Dr. & Stud. li. 1. c. 6. & li. 2. c. 3. Labrig. des Caſes edit. anno Domini 1599. tit. Execut. fol. 179. Swin. part 5. ſect. 5.*

92. An unlawful College (that is, ſuch Companies, Societies, Fraternities, and other Aſſemblies whatſoever, not confirmed nor allowed by Authority for a lawful Corporation) cannot be Executor. See afterwards *num. 99. Perkins ſect. 505 & 510. 9 H. 6. fo. 23. Swin. part 5. ſect. 9.*

93. Libellers, manifeſt Uſurers,

Sodomites, and other criminous perſons, who are forbidden to make a Teſtament, can receive no benefit by the laſt Will or Teſtament of another perſon: for it is a common received Concluſion, That he that cannot make a Teſtament or Laſt Will, by reaſon of ſome Crime by him committed, the ſame perſon is incapable of any Legacie of goods diſpoſed by the laſt Will or Teſtament of another. *Jul. Clar. ſect. Teſtament, quæſt.* 43. *num.* 2. *Vaſq. de ſucceſſ. progreſſ. li.* 1. *ſect.* 2. *num.* 18. *Swin. part* 5. *ſect.* 10, 11. *Reformat. leg. Eccleſ. tit. de Teſt. cap.* 14.

94. A Recuſant convicted at the time of the Teſtators death, or at the time of granting Adminiſtration, cannot be Executor nor Adminiſtrator. *Wingate Abr. Stat. tit. Crown, num.* 134, 141. 3 *Jac. c.* 5.

95. If the Teſtator intending to make *John at Style* Executor, ſay, I make *John at Noke* my Executor; in this caſe neither of them is to be Executor:

cutor: for *John at Style* is excluded, becauſe the Teſtator never ſpoke it; and *John at Noke* is excluded, becauſe the Teſtator never thought it. *Swin. part* 7. *ſect.* 5. *num.* 2.

96. Or if the Teſtator ſay, I make my couſin *John at Style* my Executor, if *John at Style* be not his couſin, he cannot be Executor, unleſs the Teſtator were wont commonly to call him couſin. *Michael. Graff. theſaur. com. opin. ſect. Inſtit. quæſtio* 9. *num.* 4 *Swin. part* 7. *ſect.* 5. *num.* 4.

97. Alſo if the Teſtator ſay, I make *John at Style* my Executor, and there is two of that name, neither of them ſhall be admitted; unleſs one of them were of the Teſtators familiar acquaintance, or his kinſman, and the other a ſtranger; for in ſuch caſe the ſtranger ſhall be excluded, and the other admitted. *Simo. de Prætiſ. de Interpretatione ult. Volunt. l.* 1. *fo.* 97. *num.* 1, 3, & 100. *Fran. Mantic. de conject. ult. Volunt. li.* 8. *tit.* 4. *num.* 5. *Swin. part* 7. *ſect.* 8.

98. And if both of them be of the Teſtators acquaintance, or both of them kinſmen; then he which is of the greater acquaintance, or nearer of kin, ſhall be admitted, and the other excluded: and in ſuch caſe, he ſhall be judged to be neareſt of kin, to whom Adminiſtration ſhould have been committed if the Teſtator had died Inteſtate. *Fran. Mantica de conject. ult. Volunt. li. 4. tit. 6. num. 3, 4. Simo. de Prætiſ. de interp. ult. Volunt. li. 1. fo. 96. num. 9. Swin. part 7. ſect. 8. num. 3, 4.*

99. If the Teſtator make the Poor his Executors, giving them the reſidue of his goods, this diſpoſition is not void by reaſon of incertainty, becauſe it is a Teſtament *ad pias cauſas*. By the Poor therefore is underſtood the Poor of the Pariſh where the Teſtator did dwell and keep houſe; and the Ordinary is to take care that the Poor have their due, according to the meaning of the Teſtator. Alſo, if the Teſtator bequeath any goods or

or money to the Pariſhioners of any Pariſh, to the uſe of the Church; ſuch a Bequeſt is good, and the Legacie may be recovered by the Churchwardens, who albeit in every reſpect they be not a lawful Corporation, yet in this reſpect, in favour of the Church, they are accounted a lawful Corporation. And where it is ſaid that unlawful Colledges or Companies, *&c.* (not Incorporated by the Kings Authority) cannot be Executors; yet in ſuch caſe, if the ſeveral and particular perſons, by name of an unlawful Colledge, *&c.* be appointed Executors, they are not to be repelled. *Franc. Mantica de conject. ult. Volunt. li.* 8. *tit.* 5. *num.* 2. *Tiraquel. tract. de privileg. piæ cauſæ, privileg.* 56. *Lambert Tract. de Officio Gardianarum, fo.* 43. *Bro. tit. Corporation, num.* 55, 73, 77, 84. *Fulb. li.* 1. *fo.* 42, 43. *Swin. part* 7. *ſect.* 8.

100. If the Teſtator make his own kin his Executors, in this caſe thoſe

of kin who are neareſt to him, and ſhould have had the Adminiſtration if the Teſtator had died Inteſtate, ſhall be firſt admitted, and enjoy the Executorſhip during their lives; and after their deaths, then the other next of kin to the Teſtator is to be admitted ſucceſſively one after another, and not all together: but if the Teſtator make another mans kindred his Executors, in ſuch caſe they are all to be admitted together to the Executorſhip. *Simo. de Prætiſ. de interp. ult. Volunt. li. 3. fo. 91. num. 28. Mich. Graff. theſaur. com opin. ſect. Inſtit. quæſt. 20. ſect. Fidei commiſſ. quæſtio 16. & ſect. Legat. quæſt. 41. Swin. part 7. ſect 8. num. 10.*

101. Where the Teſtator makes the next of his kin his Executor, and dies without iſſue of his body; in this caſe the father or mother, if living, ſhall have the Executorſhip, as next of kin to their ſon; contrary to the Judgement given in the 5 *E. 6.* in the Duke of *Suffolk*'s Caſe, which Caſe is

is now over-ruled, and not held for Law. *Co.* 3. *lib. fo.* 40. *in Ratcliffs Caſe there. Cowels Inſt. p.* 40. *Trin.* 22 *Car.* 1. *B. R. Styles Regeſtum practicale, p.* 21. *Swin. part* 7. *ſect.* 8. *in fine.*

102. If the Teſtator ſay, I make *A* or *B* my Executors; in this caſe it is all one as if he had ſaid, I make *A* and *B* my Executors: unleſs it be where the Teſtator bears more affection to the one then to the other; and then he which he bears moſt affection to, ſhall be preferred: as, where the Teſtator makes his brother or *John at Style* his Executors; in this caſe the brother ſhall be firſt admitted; and after his death, then *John at Style* (if he be living) ſhall be admitted. Alſo, where one of the perſons ſo named is incapable, then the diſ-junctive ſtandeth properly, and the other ſhall be admitted alone to the Executorſhip. *Jul. Clar. ſect. Teſtament, quæſt.* 80, *num.* 5. *Swin. part* 7. *ſect.* 9.

103. An

103. An Excommunicate perſon, ſo long as he ſtandeth in the Sentence of Excommunication, is not to be admitted to an Executorſhip by the Ordinary; nor can he commence any Suit there for his Legacie. *Michael Graff. theſaur. com. opin. ſect. Inſtitutio. quæſtio* 4. *Swin. part* 5. *ſect.* 6.

104. Baſtards begotten and born in Adultery or Inceſt, are not capable of any benefit by the Teſtament or Laſt Will of their Inceſtuous or Adulterous parents; except there be onely ſo much bequeathed, as will ſuffice for their competent Alimentation or Relief, that is to ſay, for their Food, Clothing, Lodging, and other meet and convenient neceſſaries, according to the degree and ability of their parents; or that it be in caſe of Lands, Tenements, and Hereditaments; for there a man may by his Teſtament or Will in writing deviſe to his Baſtard all his Lands, Tenements or Hereditaments; and ſuch Baſtard may ſue for the ſame,

and

and recover them: and ſo it was adjudged in the Lady *Griffins* Caſe, upon the Teſtament of Sir *Francis Wortly*, who deviſed all his Lands to his baſe daughter. *Mich.* 18 *Car.* 2. *B. R. Mich. Graſſ. theſaur. com. opin. ſect. Inſtit. quæſt.* 7. *Gabr. com. Concluſ. li.* 6. *tit. de Aliment. concluſio* 1. *num.* 5 & 31. *Menoch. præſump. li.* 4. *præſumptio* 157. *num.* 3. 32 *H.* 8. *c.* 1. *Brac. li.* 2. *c.* 7. *Swin. part* 2. *ſect.* 17. & *part* 5. *ſect.* 7.

105. Note alſo, that theſe inceſtuous or Adulterous Baſtards may be Executor to any other perſon, ſaving to their natural parents, and are capable of a Legacie bequeathed to them from any other perſon; yea, even to their own Inceſtuous or Adulterous brethren they may be Executors, or receive any other Teſtamentary benefit from them. *Jul. Clar. ſect. Teſtament, quæſtio* 31. *num.* 4. *Swin. part* 5. *ſect.* 7.

106. Alſo where they are appointed but onely bare and nude Executors,

tors, and receive no benefit by the Teſtament; in ſuch caſe they be admitted Executors to their own natural parents. *Simo. de Prætiſ. de interp. ult. Volunt li.5. fo.17. num.27. Swin. part 5. ſect.7.*

107. The Adulterous Grandfather may bequeath any thing to the lawful children of his own unlawful ſons or daughters, or make them his Executors: but ſo cannot the Inceſtuous Grandfather. *Covar. in D. cap.8. de Sponſal. part 2. ſect.5. num.13. Bald. C. de Inceſt. Swin. part 5. ſect.7.*

108. Several other perſons there are, who by the Civil and Eccleſiaſtical Laws are prohibited Teſtamentary benefits; but being that I finde little or no mention made of them, either in our Common or Statute-Laws, (which limit the power of thoſe Spiritual Courts here in *England*) I ſhall therefore paſs them over in ſilence, and proceed to the next Chapter.

CHAP.

CHAP. V.

Of the ſeveral ways of appointing an Executor.

109. TO name or to appoint one as Executor, is to place one in ſtead of the Teſtator, who may enter to the Teſtators goods and chattels, and have an Action againſt the Teſtators Debtors, and may diſpoſe of the ſame goods and chattels towards the payment of the Teſtators Debts, and performance of his Will: which if he neglect to do, he may be ſued by the Creditors or Legataries, ſo long as he hath Aſſetts in his hands. *Noys Max. p.*101. *Terms of the Law, verb. Executor. Swin.* 4. *ſect.* 2.

110. Now this naming or appointing an Executor is the head of the Teſtament; and as the body is dead that

that lacketh an head, ſo the Teſtament is as it were dead that lacketh an Executor; for it is the foundation of the Teſtament; and no Teſtament can ſtand without it, or be called a Teſtament: and though there be never ſo many Legacies or Deviſes given therein, yet it is but a Codicil or Will, and not a Teſtament; and the Adminiſtration of the goods, with ſuch Codicil or Will annexed, ſhall be committed to the next of kin of the party deceaſed, as of one dying Inteſtate. *Juſtin. Inſtit. l. 2. tit. de Legacies, N. 34. Swin. part 4. ſect. 2.*

111. But if an Executor be named, though no Legacie be left, or Deviſe made, yet ſuch diſpoſition is a Teſtament, whether the ſame be Solemn or Unſolemn, Written or Nuncupative, Priviledged or Unpriviledged: and in this caſe the Ordinary cannot commit the Adminiſtration of the dead mans goods, as of one dying Inteſtate, if ſuch Executor be capable and willing to undertake the Execution

cution of the Teſtament. *Bro. Abr. tit. Execut. F.NB eod. tit. Swin. part 4. ſect. 2.*

112. And as to the appointing of an Executor, it may be done either ſimply or conditionally; or from a certain time, or to a certain time; or univerſally, or particularly; or in the firſt, ſecond, third, or fourth degree, *&c.* and laſtly, one or divers may be appointed Executors. *Bro. tit. Executor*, N. 2, 9, 13, 24, 38, 117, 155. *Dyer fo.* 3. *Cowels Inſt. p.* 129.

113. If the Teſtator ſay, I make *A B* my Executor, or, I inſtitute *A B* my Executor, or, I will that *A B* be my Executor, or, I deſire *A B* to be my Executor, or, *A B* ſhall be my Executor; theſe and ſuch-like words make a ſimple nomination of an Executor, where no condition is annexed by the Teſtator: and it is not material in what part of the Teſtament the Executor is appointed; for the Law regardeth not ſo much the form or the words, as the meaning of the

that lacketh an head, ſo the Teſtament is as it were dead that lacketh an Executor; for it is the foundation of the Teſtament; and no Teſtament can ſtand without it, or be called a Teſtament: and though there be never ſo many Legacies or Deviſes given therein, yet it is but a Codicil or Will, and not a Teſtament; and the Adminiſtration of the goods, with ſuch Codicil or Will annexed, ſhall be committed to the next of kin of the party deceaſed, as of one dying Inteſtate. *Juſtin. Inſtit. l. 2. tit. de Legacies, N. 34. Swin. part 4. ſect. 2.*

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113. If the Teſtator ſay, I make *A B* my Executor, or, I inſtitute *A B* my Executor, or, I will that *A B* be my Executor, or, I deſire *A B* to be my Executor, or, *A B* ſhall be my Executor; theſe and ſuch-like words make a ſimple nomination of an Executor, where no condition is annexed by the Teſtator: and it is not material in what part of the Teſtament the Executor is appointed; for the Law regardeth not ſo much the form or the words, as the meaning of the

the Teſtator. *Mich. Graſſ. theſaur. com. opin. ſect. Legatum, quæſtio* 43. *N.* 2. *& ſect. Inſtitutio, quæſtio* 1 *&* 14. *Swin. part* 4. *ſect.* 4. *num.* 2, 3, *&* 11.

114. Therefore if the Teſtator ſay, I commit all my goods to the diſpoſition of *A B*; or, I commit my ſoul and all my goods to the hands of *A B*; or, I make *A B* Lord of all my goods; or, I make my wife Lady of all my goods; or, I leave all my goods to *A B*; or, I make *A B* Legatary of all my goods; or, I leave the reſidue of all my goods to *A B*: in theſe caſes it is preſumed that ſuch perſon is intended to be made Executor, by the Teſtator: for it is not always neceſſary to expreſs the word *Executor*, neither hath every Teſtator skill ſo to do: therefore if the Teſtator write after this manner: *In all my goods moveable and unmoveable I make* A B, though the Teſtator do not adde *Executor*, yet it is to be underſtood and ſupplied *Bro: tit.*

Execu-

Executor, 98. *Mich. Graſſ. Theſ. com. opin. ſect. Inſtit. quæſtio* 14. *Swin. part* 4. *ſect.* 4. *num.* 4, 5. *Franc. Mantica de conject. ult volunt. li.* 4. *tit.* 3. *num.* 5 & 8.

115. If the Teſtator ſay, I make *A B* my Executor, if *C D* will not; in this Caſe *C D* is preſumed to be Executor, and may be admitted, if he pleaſe, and exclude the other. Or, if the Teſtator ſuppoſing his Childe or Friend to be dead, ſay in his Will, *Foraſmuch as my Child or Brother is dead, I make* A B *my Executor:* In this caſe, if the Childe or other Perſon be alive, whom the Teſtator imagined to be dead, then he that is named Executor ſhall not be admitted to the Executorſhip, but the Childe, or other Perſon, whom the Teſtator thought to have been dead. *Franc. Mantica de conject. ult. volunt. li.* 4. *tit.* 4. *Swin. part* 4. *ſect* 4. *num.* 6.

116. When the Teſtator doth add ſomething to the aſſignation of an Executor, whereby the effect of the

diſpoſition is hindred or ſuſpended, and dependeth upon ſome future event, then ſuch aſſignation of an Executor is conditional: and there are divers words whereby the diſpoſition of the Teſtator is made conditional; as *if*, *when*, *whiles*, *whenſoever*, *whereſoever*, and ſeveral other, *&c. Mich. Graſſ. Theſ com. opin. ſect. Legatum, quæſtio* 46. *Franc. Mantica de Conject. ult. volunt. li.* 10. *tit.* 5.

117. And as there are divers words which make a conditional diſpoſition, ſo there are divers ſorts and diviſions of conditions; whereof ſome neceſſary, ſome impoſſible, ſome poſſible or indifferent: when the condition is extream, that is to ſay, either neceſſary or impoſſible; ſuch a condition hindereth not the Executor or Legatary, but that he may be admitted to the Executorſhip, or recover the Legacie, as if ſuch condition had not been at all expreſſed. *Juſtin. Inſtit. li.* 2. *tit. de Heredibus Inſtituendis, num.* 10. *Swin. part* 4. *ſect.* 5. *num.* 4 *& ſect.* 6 *num.* 2.

118. But

118. But when the condition is not extreme, but indifferent or poſſible, then it muſt firſt be fulfilled, before the Executor be admitted, or the Legatary recover his Legacie: but there are divers limitations to both theſe Rules, as will appear by the ſeveral caſes hereafter mentioned in this Chapter. *Mich. Graff. Theſaur. com. opin. ſect. Legat. quæſtio* 52. *Swin. part* 4. *ſect.*6 *num.*4.

119. If the Teſtator make *A B* his Executor, or give him an hundred pounds, if, or when his Son dyes; here the Executor or Legatary cannot obtain the Executorſhip or Legacie till ſuch a thing happen, but muſt wait the event of the condition. *Paul. de Caſtr. in li. extraneum, li.* 1. *cap. de Hered. Inſtituendis. Swin. part* 4. *ſect.*6.

120. If the Teſtator make *A B* his Executor, or give him an hundred pounds, if he marry his the Teſtators Daughter, ſuppoſing her to be living, whereas ſhe is dead; in this caſe,

though the condition be impoſſible, yet becauſe the Teſtator did think her to be living, and therefore the condition poſſible, *A B* in this caſe cannot be Executor, nor obtain the Legacie: Or, if the Daughter were living, but dyed before Marriage, in ſuch caſe it is all one; but if ſhe were living, and afterwards did refuſe to marry, yet notwithſtanding *A B* might be admitted to the Executorſhip, or obtain the Legacie. *Franc. Mantica de conject. ult. volunt. li. 2. tit. 16. num. 23. Menoch. de præſumpt. li. 4. fol. 706. num. 40. Swin. part 4. ſect. 6. num. 9, 14, 15.*

121. But if the Teſtators Daughter were willing afterwards to marry with *A B*, before he have obtained the Executorſhip or Legacie, and then he refuſeth her; in this caſe he ought not to be admited to the Executorſhip, or obtain the Legacie, unleſs after her refuſal at firſt, and before her willingneſs he be married to another woman, or have obtained the

the Executorſhip or Legacy, and is poſſeſſed thereof; for then her repentance comes too late. *Franc. Mantica de conject. ult volunt. li.* 11. *tit.*18. *num.*30, 38. *Menoch. de præſumpt. li.*4. *fol.*183. *num.*29. *Swin. part* 4. *ſect.*10.

122. Alſo if the Teſtator make *A B* his Executor, or give him 100 pound if he marry his Daughter, and he refuſes to marry her; here he cannot be admitted to the Executorſhip, or obtain the Legacie, although afterwards he be willing to marry her, and then ſhe will not marry him; unleſs that at ſuch time when he refuſed, he were not of ſufficient age to marry: for his diſſent at that time, when he could not conſent, doth not hinder him, nor is it a breach of the condition. *Mich. Graſſ. theſaur. com. opin. ſect. Legatum, Quæſtio* 46. *num.* 16. *Menoc. de Præſumpt. li.* 4. *fol.* 698. *num.*22. *Swin. part* 4. *ſect.*8.

123. If one make *A B* his Executor, or give him 100 pounds, if he

erect a Monument within three days after the Teſtators death: in this caſe, if the Executor or Legatary do perform the ſame with as much ſpeed as is poſſible, it is ſufficient, though it was not done within three days. *Swin. part.* 4. *ſect.* 6. *num.* 11.

124. If the Teſtator charge his Executor, to whom he hath given all the reſidue of his Goods, That if he do not touch the Skie with his finger, or kill his Father, to pay then to *A B* 100 pounds: in this caſe he is not bound to the performance, for ſuch Legacie to *A B* is void. *Reformatio Legum Eccleſ. tit. de Teſtamentis, C.* 15. *pag.* 135. *Swin. part* 4. *ſect.* 6. *numb.* 12.

125. Where the Teſtator makes thee Executor, or gives thee 100 pounds, if thou pay 10 pounds to *C D* before a certain time; within which time *C D* dyeth, and then thou payſt the 10 pounds within the time to his Executor, or Adminiſtrator: in this caſe, becauſe thou didſt not pay the

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10 pounds to *C D* himſelf, thou canſt not be Executor, nor obtain the Legacie. *Franc. Mantica de conject. ult. volunt. li.* 11. *tit.* 17. *num.* 25. *Swin. part* 4. *ſect.* 7.

126. But if thou be made Executor, or 100 pounds is bequeathed to thee, if thou pay unto the Teſtators Son (being an Infant) 10 pounds; in this caſe, if thou pay to the Childes Tutor, it is a ſufficient performance of the condition. *Mich. Graſſ. theſaur. com. opin. ſect. Legatum, quæſtio* 52. *Franciſc. Mantica de conject. ult. volunt. li.* 11. *tit.* 17. *num.* 29. *Swin. part* 4. *ſect.* 7.

127. Alſo if the Teſtator make thee Executor, or give thee 100 pounds, if thou go to Church on *Eaſter*-day; and when the day comes thou art willing to go, but art not able to do it, by reaſon of overflowing of waters, or ſome other neceſſary impediment: in this caſe notwithſtanding thou ſhalt be admitted to the Executorſhip, and mayſt recover the Le-

gacy, as if thou hadſt gone to the Church that day: but if at the day thou wert going to the Church, and by the way committeſt ſome crime, whereupon thou art arreſted and ſtayed; in this caſe thou ſhalt not be admitted to the Executorſhip, nor recover the Legacie, becauſe thou wert the cauſe thy ſelf wherefore the condition was not performed, and the other was *Actus Dei*. *Minſing. in ſect. penult. Inſt. de Hæred. num.* 2. *Franc. Mantica de conject. ult. Volunt. li.* 11. *tit.* 16. *num.* 24. *Swin. part* 4. *ſect.* 8.

128. If the Teſtator make thee Executor, or give thee 100 pounds if thou marry his Daughter within a Moneth; and another perſon doth hold her purpoſely from thee, that thou canſt not marry her within the time; yet in this caſe the condition is reputed to be performed by reaſon of thy willingneſs, and thou mayſt obtain the Executorſhip or Legacie: but if ſuch perſon doth not detain her

her purpoſely, but is ignorant of the Teſtators Will, then in ſuch caſe the condition is not taken to be performed. *Franc. Mantica de conject. ult. Volunt. li.*11. *tit.*16. *num.*22. *Swin. part* 4. *ſect.*8. *num.*19.

129. If the Teſtator make thee Executor, or give 100 pounds if thou bury his body within the Cathedral Church of St. *Peters* in *York*, and the Teſtator afterwards dyeth Excommunicate, for which his Sepulchre is denyed, ſo that thou canſt not bury him there; yet notwithſtanding, becauſe it was not thy fault, but the Teſtators, thou mayſt therefore obtain the Executorſhip or Legacie. *Sichard. in li.*1. *cap. de Inſt. & Subſtitut. num.*1. *Swin. part.* 4. *ſect.*8. *num.*18.

130. If the Teſtator make his Wife Executrix, or give her 100 pounds if ſhe abideth with his Children; in this caſe, if ſhe enter into bond to perform the condition, or elſe to make reſtitution, ſhe may then be admitted

ted to the Executorſhip, or obtain the Legacie. *Paul. de Caſtr. in d. li. Mutianæ. ſect. Socrus. Simo. de Præteſ. de Interp ult. volunt. li. 5. fol. 42. Interp. 2. dub. 1. num. 24, 25. Swin. part. 4. ſect. 9. Reformatio Leg. Eccleſ. tit. de Teſtam. cap. 31.*

131. Alſo if the Teſtator make thee Executor, or give thee 100 pounds, if thou never play at Cards or Dice, or, if thou never give away thy Lands: in ſuch caſe, entring into ſufficient Bonds to perform the condition, or elſe to make reſtitution, thou mayſt then be admitted to the Executorſhip, or obtain the Legacie. *Paul. de Caſtr in d. L. Mutianæ. Simo. de Prætiſ. de Interp. ult. Vol. li. 5. Interp. 2. dub. 1. numb. 25. Swin. part 4. ſect. 9.*

132. But if the Teſtator make thee Executor, or give thee 100 pounds, if thou never play at Cards or Dice, or, if thou do not at any time give away thy Lands to *A B*; here thou canſt not be admitted to the Executorſhip

ſhip, nor obtain the Legacie, until the condition be brought into that ſtate, that it cannot be infringed. *Gloſſ. in d. L. Mutianæ. Swin. part* 4. *ſect.* 9. *num.* 14.

133. Thoſe conditions which do impugn and hinder that liberty which every Teſtator ought to have by the Law in the making of his Will, are accompted unlawful; therefore if the Teſtator make thee his Executor, or give thee 100 pounds if thou ſhalt make him thy Executor, or give him 100 pounds in thy Teſtament; or, if the Teſtator make thee Executor, or give thee 100 pounds, if *A B* will; or, if the Teſtator make ſuch a perſon Executor, or give him 100 pounds whom thou wilt appoint: in theſe caſes, though thou name one to be Executor, or, that *A B* will that thou be Executor, or have the Legacie; yet thou ſhalt not be admitted to the Executorſhip, nor have the Legacie, becauſe by ſuch means that free liberty which every Teſtator

tor ought to have in the making of his Teſtament might be taken from him, and he deprived of that priviledge; therefore ſuch diſpoſitions are ſaid to be captious. *Sichard. in li. Captorias, c. de Mil. Teſt. num. 6. Mich. Graſſ. theſaur com. opin. ſect. Inſt. quæſtio* 18. *Swin. part* 4. *ſect.* 11.

134. But if the Teſtator make thee Executor, or give thee 100 pounds, if *A B* ſhall eſteem it convenient; in this caſe, if *A B* eſteem it convenient thou be admitted Executor, or have the Legacie of 100 pounds, then thou art to be admitted to the one, or mayſt obtain the other: or, if the Teſtator make one of his Servants his Executor, whom thou ſhalt chuſe; in this caſe him whom thou ſhalt chuſe of the Teſtators Servants, ſhall be Executor. Note the diverſity of theſe two Caſes, from the Caſes laſt going before. *Mich. Graſſ. theſaur. com. opin. ſect. Inſtit. quæſtio* 18. *num. 6. Swin. part* 4. *ſect.* 11.

135. If

135. If the Teſtator make thee Executor, or give thee an hundred pounds if thou never marry, or if thou marry according to the appointment or conſent of ſome other perſon; the firſt of theſe Conditions is unlawful, becauſe it forbids Marriage wholly; and the ſecond is unlawful, becauſe it is referred to another perſon to make choice for thee, who perhaps may chuſe ſuch an one as it is not fit or lawful for thee to marry with her: therefore in the firſt Caſe thou mayſt be admitted to the Executorſhip, or obtain the Legacie, as if no ſuch Condition had been: and in the ſecond Caſe, thou mayſt make choice of a woman thy ſelf, (without the appointment of the other perſon) and marry her; and then thou mayſt be admitted to the Executorſhip, or obtain the Legacie, but not before Marriage. *Fran. Mantica de conject. ult. Volunt. li.* 11. *tit.* 19. *Covar. Epitom. de Sponſal. c.* 2. *ſect.* 9. *num.* 11. *Swin. part* 4. *ſect.* 12. *Mich. Graſſ.*

Graſſ. theſaur. com. opin. ſect. Legat. quæſtio 50. *num.* 9.

136. But if the Teſtator make thee Executor, or give thee an hundred pounds, if thou doſt not marry before the age of one and twenty years, or if thou doſt not marry a widow, or ſuch or ſuch a woman, or if thou doſt not marry in the citie of *York*; in theſe Caſes if thou break the Condition, then thou loſeſt all thy intereſt as to the Executorſhip or Legacie. *Fran. Mantica de conject. ult. Volunt. li.* 11. *tit.* 19. *num.* 8, 9. *Swin. part* 4. *ſect.* 12.

137. Alſo if the Teſtator make thee Executor, or give thee an hundred pounds, if his daughter do not marry; in this Caſe, if ſhe die unmarried, thou art to be admitted to the Executorſhip, or obtain the Legacie: but if the Condition were, that thou ſhouldſt be Executor, or have an hundred pounds, if thy daughter did never marry; in this Caſe, though ſhe die unmarried, yet thou

thou art not to be admitted to the Executorſhip, or obtain the Legacie, becauſe it ſhall be preſumed that thou d dſt perſwade and hinder thy daughter from Marrying; and therefore to prevent ſuch Fraud, the Law doth reject ſuch Condition. *Fran. Mantica de conject. ult. Volunt. lib.* 11. *tit.* 19. *num.* 5. *Swin. part* 4. *ſect.* 12.

138. If the Teſtator make thee Executer after the expiration of five years after his death, or he doth make thee Executor for, and during five years after his death; this Aſſignation is lawful, and the Ordinary may commit the Adminiſtration of the Deceaſeds goods in the mean time to the next of kin; during which time, the act of the Adminiſtrator is good, and cannot be avoided by the Executor afterwards: and the Ordinary may alſo commit the Adminiſtration of the Deceaſeds goods unadminiſtred by the Executor, after the expiration of the time of the Executorſhip, where thou art appointed

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Executor but for a time. *Bro. tit. Adminiſtr.* 45. *tit. Exec.* 155. *Plo. com. in Griesby and Foxes ca. Swin. part* 4. *ſect.* 17.

139. If the Executor make his wife Executrix; and if ſhe will not or cannot be Executrix, then he maketh his ſon Executor; and if his ſon be not Executor, then he maketh his ſiſter Executrix; and if ſhe be not Executrix, then he maketh his brother Executor: in this Caſe, the Teſtator is ſaid to make degrees of Executors; and in this example there are four degrees of Executors. And obſerve always, the Executors in the firſt degree (as the Wife is here) is ſaid to be *inſtituted*, and all the reſt *ſubſtituted*. *Mich. Graſſ. theſaur. com. opin. ſect. Subſtit. quæſtio* 1. *Swin. part* 4. *ſect.* 19.

140. Note alſo, that it is lawful for the Teſtator to make as many degrees of Executors as he pleaſeth; and he may ſubſtitute into the place of one Executor, either one or more

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and into the place of many Executors he may ſubſtitute one alone, or he may ſubſtitute to every Executor one, or one of them to another. *Juſtin. Inſtit. tit. de vulgari ſubſtitutione, num.* 1, 2. *Swin. part* 4. *ſect.* 17. *Cowels inſt. pa.* 131.

141. But if the Teſtator do inſtitute divers Executors, ſubſtituting one or more to them; ſo long as any of them which was firſt inſtituted may be Executor, the ſubſtitute is not to be admitted, unleſs the Teſtator do appoint to every ſuch Executor a ſubſtitute; for then any one of theſe firſt inſtituted Executors, not being able, or refuſing to be Executor, his ſubſtitute is then to be admitted with the reſt of the Executors firſt inſtituted; whereas otherwiſe any one of the firſt inſtituted Executors in the firſt degree, lawfully undertaking the Executorſhip, all the ſubſtitutes are excluded: and in ſuch caſe, if the Executor afterwards dye inteſtate, then the Adminiſtra-

tion is to be committed of the reſt of the goods of the Teſtator deceaſed, not adminiſtred by the Executor, except in ſome ſpecial caſes. *Mich. Graſſ. theſaur. com. opin. ſect. Subſtit. quæſtio* 9. *Repam. in li.* 1. *de vulgo Subſtit. num.* 185, 187. *Swin. part* 4. *ſect.* 19.

142. If the Teſtator make thee Executor if thou give ten pounds to *A B*; and if thou do not, then he doth appoint another to be Executor; though thou refuſe to give ten pounds to *A B*, yet cannot that other be Executor, unleſs he give ten pounds to *A B*, becauſe this condition of giving expreſſed in the inſtitution, is underſtood to be repeated in the ſubſtitution. *Menoch. de præſumptio* 177. *num.* 28. *Swin. part* 4. *ſect.* 19.

143. Note that every one may appoint as many Executors as he liſts, ſo that the number be not infinite, as to ſay, *I make all the men in the world my Executors*: for ſuch an Aſſign-

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ment (being an Argument of inſanity of the minde) is void, at leaſt in effect. *Mich. Graſſ. theſaur. com. opin. ſect. Inſtit. quæſtio* 13.

CHAP. VI.

Of appointing Tutors, and ſome few things touching Childrens Portions.

144. NOte, that every one, who may be an Executor, may be a Tutor; but no Tutor may intermeddle as Tutor, until he be confirmed by the Ordinary; and where one that is named Tutor is Lunatick, or abſent beyond Sea, in ſuch like caſes the Ordinary may appoint another during ſuch impediment: Alſo it is the cuſtom of ſeveral places, that when divers are appointed Tutors, there in ſuch caſe one alone may Adminiſter, when the other cannot

or will not intermeddle with the Tutorship *Swin. part.3. sect.* 10,12. *Cowels Inst. pag.*31.

145. And it is also the custom of several places, that if the Father appoint not a Tutor by his Will to his Children, then the Mother by her Will may appoint one; and if neither Father nor Mother appoint one, then a Stranger (if he make the Child his Executor) may appoint one; and if there be no Tutor Testamentary, then the Ordinary may appoint one *Fleta, li. c.*9. *Swin. part* 3. *sect.* 9 *Vide Co.*3. *li fol.*38. *Cowels Inst. pa* 30,41. *Noyes Maximes, pa.*105.

146. Now as to the appointing o Tutors, it matters not by what form of words they are appointed, so tha the Testators meaning can but appear; nor in what Language the Tutor is assigned, whether in English Latine, Greek, or any other Tongue *Swin. part* 3. *sect.* 12. *Socin. Jun Consil.* 83 *Vol.* 1.

147. It was the custom of man place

places formerly, that a Boy after he had accompliſhed the age of fourteen years, and a Girl after ſhe had accompliſhed the age of twelve years, might then chuſe their own Tutors if they pleaſed, and refuſe the Tutors appointed them by their Fathers Will; but now by the Statute of 12 *Car.* 2. *cap.* 24. every Father, whether he be of the age of twenty one years or under, may by Deed executed in his life-time, or by his laſt Will and Teſtament in Writing, delivered in the preſence of two or more credible Witneſſes, diſpoſe of his Children under the age of twenty one years, and not married at the time of his death, for and during ſuch time as they ſhall remain under the age of twenty one years, or any leſſer time, to the cuſtody and tuition of any perſon or perſons in poſſeſſion or remainder (Popiſh Recuſants excepted) and ſuch diſpoſſeſſion of ſuch Children, ſince the 24 of *Febr.* 1645, or hereafter to be

made, ſhall be good againſt all and every perſon and perſons claiming any ſuch Childe or Children, as Guardian in Soccage or otherwiſe. *Litt. li.2. cap.5. Swin. part 3. ſect.11. Vide Noyes Max. pag.105. & Cowels Inſt. pag.33. 12 Car.2. cap.24.*

148. And ſuch perſon to whom ſuch Children ſhall be diſpoſed or deviſed, may have an Action of Raviſhment of Ward, or Treſpaſs againſt ſuch perſon as ſhall wrongfully take away or detain ſuch Child or Children, for the recovery of them, and recover damages for the ſame in ſuch Actions, for the uſe of ſuch Child or Children; and they are alſo impowred by the ſame Act of Parliament, to take into their cuſtody, to the uſe of ſuch Child or Children, the profits of all the Lands, Tenements and Hereditaments of ſuch Child or Children, and the cuſtody and management of their Goods, Chattels and perſonal Eſtate, until the age of twenty one years, or leſſer time, according

cording to the Parents diſpoſition; and may bring an Action in purſuance thereof, as by the Law Guardian in Soccage might do. 12 *Car.* 2. *cap.* 24.

149. Note, that every Tutor ought to take care, that his Pupil be honeſtly and vertuouſly brought up, and muſt provide for him Meat, Drink, Apparel, Lodging, and other neceſſaries according to his quality and condition, and ought to diſpoſe of his Pupils Goods and Chattels to the Pupils beſt advantage, in ſelling of ſuch Goods as will not keep without damage, and preſerving of the reſt till the Pupil come of age: And to this intent, it is the cuſtom in many places, eſpecially within the Province of *York*, that the Tutor at the Entry of his Office makes a true Inventary of all the Goods and Chattels of his Pupils, and doth enter into Bond with Sureties before the Ordinary, to make a juſt accompt; and then he is admitted and confirmed,

and may ſeize upon the body of the Pupil, and take poſſeſſion of his Goods. *Bro. tit. Guardian, F. N. B. fol.*118. *b. Swin. part* 3. *ſect.* 13. *and Cowels Inſt. pag.*49.

150. Formerly there were ſeveral Ages to be taken notice of both in Boys and Girls, when they ſhould be out of Tutorſhip; as, if a Boy were in Ward, by reaſon of Lands held in Knights ſervice, he could not be out of Wardſhip till twenty one years of Age; but in other caſes at fourteen years of Age he might chuſe a new Tutor, if he liked not his old, and might call his old Tutor then to accompt: and ſo a Wench at twelve years of age might chuſe her Tutor, unleſs ſhe were in Ward by reaſon of Lands held in Knights ſervice, as aforeſaid; and then ſhe was to continue in Wardſhip till ſixteen years of age, unleſs ſhe were fourteen at the death of her Anceſtor; and then ſhe was free, and might chuſe her Tutor: but now theſe Wardſhips

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are quite taken away by the 12 *Car.* 2. and every one may diſpoſe of his Children to whom he pleaſeth, obſerving the Rules aforeſaid, in number 147. *Litt. li.2.cap.4. Brac. li.2. cap.37. num.3. Bro.tit. Guard.* 7. 35 *H.6. fol.52. Co. Litt. fol.78. Fleta, li.* 1. *cap.12. Weſt.1. cap.22. Mert. cap.6. Co. 2 part Inſt fol* 90 *and* 203,135,136. *Stat.Marlbr. cap.* 17. *Cowels Inſt. pag.* 37 *and* 45. *Swin. part* 3. *ſect.* 14. *F. N. B.* 143.

151. Note that there is a general cuſtom within the Province of *York*, and in ſeveral other places, that there is due to the lawful Children of every man, being an inhabitant or houſholder within the ſame Province, (and dying there, or elſewhere) a filial or Childes part and portion, which is ſometimes a third part, and ſometimes an half part of the Fathers cleer moveable Goods, as hath been aforeſhewed, unleſs the Child be heir to his Father, or were advanced by him in his

his life-time; upon which exceptions hereafter follow ſeveral obſervations. *Lindwood in C. Stat. de Teſtament. li. 3. Provinc. Conſtit. Cant. Brac. lib. 2. c. 26. F. M. B. de Rat. part honor. Swin. part 3. ſect. 18.*

152. As, if the Father ſhould by his laſt Will and Teſtament forbid his Child to have any portion of his Goods, ſuch Will in ſuch Caſes is void, and the Child may notwithſtanding recover his filial part or portion: alſo, if the Father ſhould leave his Child but twenty pounds, when by the rate of the Inventary his part comes to an hundred pounds; here he may refuſe the Legacie, and recover his full portion, notwithſtanding the Will: or, if the Father ſhould impoſe any condition upon the ſaid portion, as to be paid ſeven years after his death, or the like; yet the Child may ſue for it preſently after his Fathers death, and recover it before the ſeven years be out; for it is preſently due upon the Fathers death,

death, notwithſtanding his Fathers Will to the contrary: and if the Father by his Will ſhould bequeath the Portion after the Childs death to any other perſon, in ſuch caſe the Will is void, and the Portion ſhall go to the Executors or Adminiſtrators of the Child after his death: But I ſuppoſe if the Father leave the Child a far greater ſum then by the rate of the Inventary the Childes part would come unto; in this caſe, the Father may impoſe what condition he pleaſeth upon it, and the Child muſt either take it with the condition annexed, or otherwiſe he may refuſe it, and ſtand to his Childs part without condition annexed to it. *Swin. part* 3. *ſect.* 18. *num.* 4,5,6,7 & 8.

153. Alſo, if a man have a Son or Daughter married in his lifetime, who hath a Child or Children, and then dyes, and afterwards the Grand-father dyes; in this caſe the Grand-children ſhall recover ſuch part of the Grand-fathers Goods

Goods as ſhould have been due to their Father or Mother for their Childes Portion if they had lived. *Reformatio Legum Eccleſ. tit. Teſt. cap.* 10.

154. If the Father leave a Legacie to his Child, being neither Heir, nor advanced by him in his life-time, and do not mention whether it ſhall be in lieu and recompence of his filial portion or no; in ſuch caſe, if it be as much or more in quantity then the filial portion extends unto by the rate of the Inventary, or if it want but a very little thereof, then it ſhall be preſumed to be given in lieu of his Portion; but if the Legacie be very ſmall, then the Child ſhall both recover the ſaid Legacie, and his filial Portion too. *Menoch. de Præſumpt. li.* 4. *Præſumptio* 109. *num.* 6, 26 *and* 110. *Swin. part* 3. *ſect.* 18. *num.* 9.

155. Where the Child is Heir to his Father in Fee-ſimple or Fee-tail, though the Lands be but of very

ſmall

ſmall value in regard of the perſonal Eſtate of his Father, yet he is thereby barred from having any filial Portion, by the cuſtom of the Province of *York*, and ſome other places: yea, although he be but Heir in reverſion, or hold Lands as Heir which are but Mortgaged with power of Redemption upon payment of ſuch a ſum of money at a certain day; yet during ſuch holding, till the condition be performed, he is barred of his filial portion; but if he have onely copyhold-lands after his Fathers death, in ſuch caſe he is not barred from the recovery of his filial Portion. *Dyer, fol.* 124. *pl.* 38. *Swinbor. part* 3. *ſect.* 18. *and the opinions of Sir Tho. Heſcoth, Doctor of the Civil Law, and Sir Jo. Savile, one of the Barons of the Exchequer, Judge of Aſſize at York* 1604, *cited by Mr. Swinborne in his Marginal Notes.*

156. It

156. If the Father beſtow or give any thing to a man of Trade, to take his Son an Apprentiſe, and to teach him his Trade; or beſtow any thing upon a School-maſter or Tutor in the Univerſities of *Oxford* or *Cambridge*, for the increaſe of his Childs knowledge in Learning; or buy an Advowſon or Eccleſiaſtical Benefice or Dignity, and afterwards preſents his Son to it; or the Son being much indebted, the Father pays off his debts, or buys an Office and beſtows it upon his Son; or, if any other but the Father beſtow a preferment on his Son, though it be never ſo much; yet none of all theſe ſhall be accounted ſuch preferment or advancement, as to bar the Child from the recovery of his filial Portion. *Claudius Battandier, Tract. de Legitima. cap.*12. *num.*19, 20, 21, 28, 22, 31. *Swin. part* 3. *ſect.*18.

157. But it is ſaid by ſome, that if the Father beſtow a Leaſe upon his Child, or grant to him an Annuity for life,

life, out of his Lands; and though the Child be to reap no benefit by theſe, during his Fathers life, but after his death; yet it's held for a preferment, becauſe it was aſſured to him in his Fathers life-time. *Swin. part* 3. *ſect.* 18. *num.* 25.

158. And it is granted for certainty, that if the Father beſtow a competent portion with his Daughter in Marriage, upon him that ſhould marry her; this is ſuch an advancement as ſhall bar her from the demand of a filial Portion; but it is to be underſtood, that this competent Portion muſt be equal, or not far inferiour to that quantity which ſhould fall to be due to ſuch a Child after the rate and proportion of the Fathers Eſtate at that very time when he beſtowes it on his Child, and not according to ſuch quantity as ſhould fall due at the time of the Fathers death afterwards. *Swin. part* 3. *ſect.* 18. *num.* 22, 26, 27.

159. But if ſuch gift be not competent,

petent, but far under the rateable part of that which would fall due to the Child, as 5 *l.* to put in his Purſe, or ſpend at his pleaſure, when perhaps the filial Portion would amount to ſeveral hundreds of pounds; this is not ſuch an advancement as ſhall hinder ſuch Childe from the recovery of a filial portion. *Swin. part* 3. *ſect.* 18. *num.* 28.

160. Or if a man ſeized in Fee-ſimple of thirty Acres of Land, hath Iſſue two Daughters, and giveth ten Acres with one of them in frank-Marriage, and dyeth ſeized of the other twenty Acres; in this caſe, ſhe that is married may, if ſhe will, have part of thoſe twenty Acres alſo, and put them in *hotch-potch* with the other Land, and ſuffer the ſame to lye commixed and mingled together, and ſo an equal diviſion ſhall be made betwixt the two Siſters, and each of them ſhall have fifteen Acres whereas otherwiſe the Siſter married would get but ten Acres. *Litt.* 59 *Fynche*

Fynches Law, pag. 124. *Terms of the Law, verbum hotch-potch. Swin. part* 3. *ſect.* 18. *numb.* 33.

161. Note, that by Portion is to be underſtood, not onely a ſum of money, or part of the Fathers Goods and Chattels; but alſo Lands and Annuities beſtowed by the Father upon the Childe. *Swin. part* 3. *ſect.* 18. *num.* 29.

CHAP. VII.

What things are deviſeable by Will, and what not.

162. OF Lands, Tenements and Hereditaments, ſome are deviſeable by Cuſtom, and ſome by force of certain Statutes, as hereafter appears. *Cowels Inſt. pag.* 138. *Swin part* 3. *ſect.* 2.

163. Lands, Tenements and Hereditaments holden in Gavel-kinde,

by the cuſtom of *Kent*, though they be holden in Knights ſervice, may be given, or deviſed by Will, and that without licenſe of the Lords, ſaving to the Lords the Rents and ſervices due out of the ſame Lands and Tenements. *Terms of the Law, verb. Gavel-kinde. Mich.* 1655. *in B. R. Hammond and Thornhills Ca. Syles Rep. fol.*476. *Swin. part* 3. *ſect.*3.

164. And ſo Lands, Tenements and Hereditaments lying in *London, York, Oxford*, &c. and other places where the ſame are held in Burgage-Tenure, may be deviſed by Will, for to hold in Fee-ſimple, Fee-tail, for life, for years, *&c.* and if he who holds ſuch Lands, *&c.* in Burgage-Tenure be a Citizen or Burgeſs of the City or Burrough, where ſuch Lands, Tenements or Hereditaments be holden in Burgage-Tenure; then he may deviſe the ſame in Mortmain, which otherwiſe he could not do, if he were not Citizen, Burgeſs, or Freeman of the ſame place: and it is not neceſ-

ſary

ſary that the Will wherein Burgage-Land is deviſed ſhould be in writing. But note, that the cuſtom of the place muſt be obſerved, concerning the Probate or Inrolment of ſuch Wills, *&c. F. N. B. Bre. ex Gravi quærela in pr. Bro. tit. deviſe* 22, 43 *and* 51. *Dr. & Stud. li.* 1. *cap.* 7 *and* 10. *Swin. part* 3. *ſect.* 3. *Perkins, Sec.* 577, 578. *pag.* 49. *E.* 3. *deviſe* 8.

165. The Wife ſo long as ſhe lives unmarried, ſhall have half of her Husbands Lands holden in Gavelkinde. *Co. on Litt. fol.* 111. *Old Terms of the Law, verb. Gavelkinde.*

166. And of Lands held in Burrough Engliſh, by the cuſtom of ſome places, the Widow ſhall have the whole, and ſometimes the half of her Husbands Eſtate, *Dum ſola & caſta vixerit. Co. on Litt. fol.* 111. *F. N. B.* 150. *Litt. li.* 2. *cap.* 10.

167. By the Stat. 32 *H.* 8. *cap.* 1. every one (except a woman Covert, an Infant under the age of one and

twenty years, or a perſon *De non ſane Memorie*) may by their laſt Will and Teſtament in writing, or other Act lawfully executed in their lifetime, give, diſpoſe, Will or deviſe, all ſuch Lands, Tenements and Hereditaments, as they are ſolely ſeized of in Fee-ſimple, or as much as of right in them is, of all ſuch Lands, Tenements and Hereditaments, as they are ſeized of in Fee-ſimple in Copercenary, or in Common in Fee-ſimple, to any perſon or perſons (except to Bodies politick and corporate) And two parts of three of all ſuch Lands, Tenements, or other Hereditaments, as they hold in Knights ſervice. See now the 12 *Car.2.cap.*24. 32 *H.*8. *cap.*1,34. *and* 35 *H.*8. *cap.*5. *Fynch. Law, pag.* 169, 170. *Co. on Litt.fol.* 111. *b. Swin. part* 3. *ſect.* 3 *and* 4. *And Wingates Abr. of Stat. tit. Wills.*

168. All manner of Goods and Chattels real and perſonal, moveable and immoveable, may be deviſed by Will

Will or Teſtament, except in ſome certain caſes following. *Perkins, ſect.* 511. *Lind. in C. Stat. de Teſtament. li.* 3. *Provinc. Conſt. Cantibr. Swin. part* 3. *ſect.* 5. *Cowels Inſt. pag.* 140.

169. As where two men are joyntly poſſeſſed of Goods and Chattels real or perſonal, one of them cannot make his Will, and bequeath his part to another; for when he dyes, his part goes to the ſurvivor: and ſo it is in Lands, Tenements, and Hereditaments alſo. *Perkins, ſect.* 500, 526. *Dr. & Stud. li.* 1. *cap.* 6. *Litt. li.* 3. *cap.* 3. *Cowels Inſt. pag.* 140. *Clerk of Aſſize, pag.* 63.

170. Nor can a Spiritual perſon, or Maſter of a Colledge or Hoſpital, or Mayor of a City, deviſe thoſe things which belong to their Church, Colledge, Hoſpital, or City; nor can the Crown or Jewels of the Realm be deviſed by Will, but they may be given by Letters-patents; and a Parſon by Will may deviſe the Corn

growing on the Glebe-Land at the time of his death. *Perkins, ſect.* 496 *and* 497, 498. *Brac.* 1. *li.* 1, 2. *cap.* 14. *Dr. & Stud. li.* 2. *cap.* 39. *Cowels Inſt. pag.* 125. *F. N. B. deviſe* 5. *& Exer.* 108. *Swin. part* 3. *ſect* 6.

171. The Husband cannot deviſe ſuch Goods as his Wife hath, as being Executrix to another; nor ſuch things as are in Action, as debts due to her before Marriage by Obligation or Contract, unleſs he and his Wife ſue and recover the ſame during Marriage, or that he renew the Bonds, and take them in his own Name; otherwiſe after his death they remain to her. *Co. on Litt. fol.* 351. *b.* 9 *H.* 6, 52. *&* 21 *H.* 7. *fol.* 29. *Kitchin, fol.* 251. *a. Finches Law, pag.* 44 *&* 108. *Bro. Teſtam.* 11. *Swin. part* 2. *ſect.* 9. *num.* 13.

172. Alſo if the Husband be poſſeſſed of a Terme or Leaſe for years in right of his Wife, he cannot deviſe it by his Will, but he may grant it away, or diſpoſe of it in his life-time;

or

or, if he make no diſpoſition thereof, yet if he ſurvive her, then it falls to him; and in ſuch Caſe he may deviſe it by VVill. *Dame Hales ca. Plo. com. fol.* 260. *Co. on Litt. fol.* 251. *a. Kitchin, pag.* 267. *b.* 7 *H.* 6, 1. *Perkins, ſect.* 560. *Dr. & Stud. li.* 1. *cap.* 7.

173. An Adminiſtrator cannot deviſe thoſe Goods by VVill, which he hath as Adminiſtrator to another perſon dying inteſtate, but Adminiſtration thereof ſhall be committed to the next of Kin to the firſt Inteſtate; neither can an Executor deviſe thoſe Goods by way of Legacy, which he hath as Executor; but he may make his Teſtament, and appoint another Executor, who ſhall have the Adminiſtration of the ſame Goods, to the uſe of the firſt Teſtator. *Fynches Law, pag.* 168. *Bro. Adm.* 7. *F. N. Br. Adm.* 3. 31 *E.* 3. *cap.* 11. *Plo. com. fol.* 525, 526. *Swin. part* 3. *ſect.* 6.

174. Thoſe things alſo which belong to the Heir after the Teſtators

edath, cannot be deviſed by VVill as Glaſs-windows, VVainſcote, Tables dormant, and Benches affixed thereunto, or mortiſed in the Earth; Furnaces, Coppers, Leads, Ovens, &c. ſet in Morter or Stone; nor Trees, nor Graſs growing, &c. *Bro. Exer.* 65. *Cowel Inſt. pag.* 140. *Co.* 4. *Rep. fol.* 62. *Swin. part* 3. *ſect.* 6. *Noyes Max. pag.* 106.

175. But Corn growing on the Land at the time of the Teſtators death may be deviſed by VVill, by thoſe who are ſeized in Fee-ſimple, Fee-tail, or for life; and alſo by Tenant in Dower, Tenant by the Curteſie, and Tenant in Mortgage, and their Tenants; and he who is ſeized in right of his VVife, although their Eſtates do determine before the ſaid Corn be ripe and ſevered, except in ſome ſpecial Caſes. *Perkins, ſect.* 512, 514 & 522. *Dr. & Stud. li.* 1. *cap.* 20.

176. If a woman Tenant in Dower ſow her Land, and afterwards mar-

ry,

ry, and the Husband dyes before ſeverance of the Corn; in this Caſe it remains to her, and he cannot deviſe it: but if it had been ſown after the Marriage, he might have deviſed it. *Clerk of Aſſize, pag.* 57. *Abr. Dr. & Stud. li.* 1. *cap.* 20.

177. If Tenant for life have Hops growing, and dye a little before the ſeverance of them; in this Caſe the Executors or Adminiſtrators ſhall have them, and not he in Reverſion or Remainder; for the Hops are accounted as Emblements, they growing by Manurance and Induſtry of the Owner, by the making of Hills, and ſetting of Poles. *Vide Mich.* 11 *Car.* 1. *B.R. Latham and Attwoolls Caſe, Cro.* 1 *part fol.* 396.

178. As Goods and Chattels may be deviſed, as aforeſaid; it is now further obſervable what a quantity or proportion of Goods and Chattels the Teſtator may deviſe by his Will: obſerve therefore, that if the Teſtator have neither Wife nor Childe

Childe at the time of his death, he he may then diſpoſe and deviſe all the cleer reſidue of his Goods and Chattels, over and above the diſcharging Funeral-expences and his debts. *Lindwood in C. Statut. de Teſtament. li.3. Pro. Conſt. Cant. verbum defunct. Brac.li 2. cap.26. Swin. part 3. ſect. 16.*

179. But it is the cuſtom of many places, eſpecially within the Province of *York*, that if the Teſtator have a Wife or Childe at the time of his death, that then he can but diſpoſe of half of ſuch his cleer Goods, and the other half is to go to the Wife or Childe; and if he have both a Wife and Childe, or Children at the time of his death, then the Goods are divided into three parts; whereof one part is to the VVife, another to the Childe or Children, and the other third part, called the deaths part, is left to his diſpoſing; and if no diſpoſition be made thereof, it falls to the Executor: but note here that

hat if the Childe or Children were Heir to the Teſtator, or were advanced by the Teſtator in his lifetime, then the Teſtator may deviſe one half of the cleer goods, and the other half ſhall go to his VVife. *F.N. B. Bre. de Rat. part bonor. Bro. eod. tit. N.6. M.7. E.4. fol.21.a. Brac.li. 2. cap.26. Fleta, li.2. cap. 50. Glan. li. 2. cap. 20. Co. 2 part Inſt. fol. 33. Swin. part 3 ſect.16. Refor. Legum Eccleſiaſt. tit. Teſt. cap.10.*

180. Note, where the VVife and Children ought to have a rateable part of the Goods of the deceaſed, be it third part or half, as the caſe is, there alſo they ought to have a like part of the debts due by the deceaſed, after they are recovered by the Executor or Adminiſtrator; but of Leaſes they can have no rateable part, where they uſe to have a rateable part of the moveable Goods and Debts recovered, unleſs it be by ſpecial cuſtom of the City, County, Deanry, or place where the Teſtator dwelled

dwelled, and had ſuch Leaſes. *Swin. part 3. ſect. 16. F. N. B. Breve de Rationabl. part. bon.*

181. This rateable part of th Goods to the Wife and Children, i ſaved to them by the Statute of *Magna Charta:* but note, the Wife o Children cannot ſue the Executor o Adminiſtrator for their rateabl parts, till all the Teſtators Debts b paid; and then what remains is t be divided according to the Rule aforeſaid, into two or three parts before any Legacies be paid; fo they muſt all be paid out of th deaths part after the diviſion. *Magna Charta, C.* 18. *Regiſt. fol.* 142. *b F. N. B.* 122. *b. M.* 7. *E.* 4. *fol.* 21. *a Co.* 2 *part Inſt. fol.* 33.

CHAP

CHAP. VIII.

everal Caſes concerning the bequeathing of Legacies, and alſo touching Deviſes.

182. AS an Executor may be appointed divers ways, as is hewed before, chap. 5. ſo alſo a Legacie may be given after divers ways, either ſimply or conditionally, *&c. Swin. part* 4. *ſect.* 3. *num.*

183. That Legacie is ſaid to be ure and ſimple, which is given ithout a condition annexed to : and as in appointing an Exeutor, it matters not after what orm of words it be; ſo it is in he bequeathing of a Legacie, for ſkills not after what form the ame be given, ſo that the Teſtators eaning do but appear whether it

it be in Goods and Chattels, or Lands and Tenements. *Swin. part 4. ſect. 4. num. 18.*

184. Note, that a Legacy may be given from a certain time, or until a certain time; albeit the Legatary dye in the mean time, before the day come, yet the Executors or Adminiſtrators of the Legatary may recover the ſame when once the day is paſt, as the Legatary himſelf might have done if he had lived ſo long; unleſs the meaning of the Teſtator be to the contrary, or that it be ſuch a thing as cannot be tranſmitted to the Executor, as perſonal ſervice: but if the Legacy be given after an uncertain time, as where the Teſtator gives thee an hundred pounds when his Son ſhall dye, or the like; there if thou dye before the time come, the Executors or Adminiſtrators can then recover nothing. So note the diverſitie. *Mich. Graſſ. theſaur. com. opin. ſect. Legat. quæſt. 43. Mantica de conject. ult. volunt. li. 11. tit. 20. num.*

*num.*8. *Swin. part* 4. *ſect.*17. *Refor. Legum Eccleſ. tit. Teſtament. cap.*26.

185. If a man deviſe to his Daughter an hundred pounds when ſhe ſhall be married, or to his Son when he ſhall be of the Age of twenty one years; here if they dye before the time appointed, their Executors ſhall not have it: But if the deviſe were of an hundred pounds to the Daughter, to be paid her when ſhe ſhall be married; or to the Son, to be paid him when he ſhall attain the age of twenty one years; in ſuch caſe, if they dye before ſuch time, then their Executors may recover the Legacy. *Tr.* 1653. *B.R. in Dumlowe & Shawes Ca. Hughes grand Abridg.* 1 *part, pag.* 664. *cap.*14.

186. Note that a Legatary may not of his own Authority take the Legacy, and ſerve himſelf, but muſt receive the ſame at the hands of the Executor; except in ſome caſes, as where the Legatary is poſſeſſed of his Legacy at the time of the Teſtators death,

deaths; for in ſuch caſes, he may retain and keep it, if there be ſufficient aſſets beſides in the Executors hands to pay the Teſtators Debt; or, if the Teſtators give licenſe to the Legatary to enter to his Legacie, then he may do it without the Executors conſent; and if he be both Legatary and Executor, then he may ſerve himſelf. *Perkins, ſect.* 488. *Hernes Law of Con. pag.* 88. *Socin. Jun. Conſil.* 111. *vol.* 1. *Swin. part ſect.* 4. *num.* 23. *Perkins, ſect.* 570, 572, 573.

187. But the Legatary hath no remedy by the Common Law for any Legacie of goods to him bequeathed, if the Executor will not deliver the ſame; but he muſt in this caſe have a Citation for the Executor, to appear before the Ordinary, or other competent Eccleſiaſtical Judge, to anſwer him in cauſe of his Legacie, except in caſe where a particular thing is bequeathed, as the Teſtators Horſe or Signet, *&c.* and in ſuch caſe,

caſe, the Legatary may ſue at Common Law for the ſame. *Bro. deviſe, num.* 3, 6, 14, 27, 30. *Terms of the Law, verbum Deviſe. Swin. part* 4. *ſect.* 4. *num.* 23.

188. Alſo if the Teſtator will that his Executors ſhall ſell his Land, and pay ſuch and ſuch Legacies out of the Moneys; in this caſe the Legataries may ſue at Common Law, and not in the Spiritual Court for their Legacies. *Mich.* 5 *P. & M. Dyer, fol.* 151, 152. *Vide M.* 29. *&* 30 *Eliz. C. B. Germyes Caſe. Leon. Rep. fol.* 87. *& Tr.* 17 *Jac. C. B. Rott.* 895. *Edwards & Graves Caſe. Hob. Rep. fol.* 265.

189. But if the Legacies be granted to be paid out of Leaſes, and not out of Fee-ſimple-Lands; then the Legatary may ſue in the Spiritual Court for ſuch Legacie. *Brownlowes* 1 *part Rep. fol.* 34.

190. *Teſtamento cum duo inter ſe pugnantia reperiuntur, ultimum ratum eſt:* If there be divers deviſes of

one thing in one Will, the laſt deviſe taketh place only. *Co. on Litt. fol. 112. b.*

191. If the Teſtator bequeath to *A B* all his Goods; in this caſe it is the opinion of ſome, that *A B* ſhall have the Teſtators whole Eſtate actively and paſſively, (onely his Lands, Tenements, and Freehold excepted) being in effect, his Executor or Heirs, as the Civil Law terms him, and is hereby chargeable with the Teſtator debts, ſo far as the Goods will extend. *Gloſſ. in L. his verbis, ſect. de Hæred. Inſtit. Swin. part 7. ſect. 10.*

192. But others are of opinion, that if a man grant *omnia bona*, (that is, all his Goods;) in this caſe, Leaſes for years, nor a Ward, nor things in Action, as debts upon Promiſe or Obligation, ſhall not paſs thereby; for theſe are Chattels. *4 E. 6. Bro. tit. Grants 51. & Done 43. Kitchin, pa. 44. b.*

193. But if the Teſtator do bequeath

queath to *A B* all his Chattels; in ſuch caſe he ſhall have the Teſtators whole Eſtate, Leaſes and Wards too; for *Cattalla* includes all but free-hold, as well immoveable as moveable. *Standford. de præro. Regis, cap.* 16. *Kitchin Court. Leet, pag.* 45. *a. &* 46. *a. Swin. part* 7. *ſect.* 10.

194. But note, that *A B* by ſuch deviſe ſhall not have Glaſs of the Widows, Wainſcote, Tables dormant, Fats in the Brew-houſe fixed to the Free-hold; nor Furnaces, nor the Box or Cheſt wherein the Teſtators Evidences are; nor Hawks, nor Hounds, nor Doves in the Dove-houſe, nor Fiſhes in the Pond, nor Deer in the Park: for theſe things belong all to the Heir. *Fynch. pag.* 22. *Noyes Max. pag.* 101 *and* 107. *Vide Hill.* 43 *Eliz. C. B. Gray and Trowes Ca. Goldesboro. Rep. pag.* 129. *pl.* 24. 18 *E.* 4. *fol.* 14. 4 *H.* 7, 10. *And* 21 *H.* 7, 26. *Kitchin, pag.* 45. *b.* 46. *a.*

195. Note alſo, that if *A B* dye

before he have proved the deceaſeds Will, wherein he bequeaths to him all his Goods, or all his Chattels, as foreſaid; yet in ſuch caſe Adminiſtration ſhall be committed to the next of Kin to the ſaid *A B*, and not to the next of Kin to the Teſtator. 23 *Eliz. Dyer, fol.* 371. *Swin. part* 4. *ſect.* 10.

196. But if the Teſtator, in either of the caſes, make another man Executor; then the Legatary ſhall not enter into the whole Eſtate of the deceaſed; but the Executor proving the Will, is to enter, and may receive or ſue for all the debts due to the Teſtator, and ſtands alſo chargeable with the payment of the Teſtators debts; and what remains is due to the Univerſal Legatary. *Mich. Graff. theſaur. com. opin. ſect. Inſt. q.* 14. *num.* 3. *Swin. part* 7. *ſect.* 10.

197. If the Teſtator bequeath to *A B* all his moveable goods; here the Legatary may recover all the Teſtators perſonal Goods and Cattle, both quick

quick and dead, which either move themſelves (as Horſes, Sheep, Oxen, Swine, *&c.*) or can be moved by another, as Houſhold-ſtuff, Plate, Plough-geer, Waynes, Carts, Corn in the Barnes or Garners, and alſo Corn growing on the ground: And ſuch Debts as were due to the Teſtator, and did ariſe by reaſon of ſuch moveable things, and for recovery whereof, there lyeth an Action perſonal, do belong alſo to the Legatary; but the Legatary cannot ſue for the ſame in his own Name, if another man be made Executor; but the Executor muſt ſue for the ſame, and after recovery, deliver the ſame to the Legatary. *Paul. de Caſtrenſ. Conſil.* 132. *vol.* 1. *Socin. Jun. Conſil.* 60. *vol.* 1. *Stamf.* 45. *Swin. part* 7. *ſect.* 10. *Noyes Max. pag.* 99. *Mich. Graſſ. theſaur. com. opin. ſect. Legat. quæſt.* 19.

198. But where the Teſtator doth bequeath to *A B* all his Goods immoveable; here the Legatary hath

right onely to the Leaſes for years, which did belong to the Teſtator, and to ſuch benefits as ariſe thereby, as Fruit on the Trees, Graſs growing on the Ground, Fiſhes in the Pond, and Pigeons in the Dove-coate, as appurtenant to the Grounds demiſed, or as parcel of the Fruits of the Tenements (which if they were out of Leaſe) did belong to the Heir: but as to Corn growing on the Ground, or other Fruits induſtrial, as Hemp, Lyne, *&c.* Turneps, Carrets, or other Roots; they are accounted amongſt the moveable Goods, and ſuch Legatary ſhall not have them: but he ſhall have ſuch Debts as were due to the Teſtator by reaſon of ſomething immoveable, as Rents due out of Leaſes, or Arrearages of Rents due out of Lands, Tenements and Hereditaments; but he cannot Commence Suit in his own Name, if another be made Executor, as is ſhewed before, number 197. *Cowels Interp. verb. Chattels. Kelloway, Rep. fol.*

*fol.*118. *Stamf. cap.*16. *fol.*45. *Mich. Graſſ. theſaur. com. opin. ſect. Legatum, q.*19. *num.*5. *Swin. part.*7. *ſect.* 10. *Bro. Executor* 49.

199. If the Teſtator bequeath to thee all his Houſhold-ſtuff.; in this caſe thou ſhalt have all his Tables, Forms, Stools, Chairs, Truncks, Cheſts, Cupboards, Bedſteads, Curtains, Vallence, Rugs, Blankets, and all manner of Bedding; and alſo Hangings, Carpets, and all manner of Linen, as Sheets, Table-cloths, *&c.* Baſons and Ewers, Candleſticks, Salts, Flaggons, Pottingers, Sawcers, *&c.* Bowls, Barrels, and all manner of Veſſels ſerving for meat or Drink, whether they be of Earth, Wood, Glaſs, Pewter, Braſs, or Silver, or Gold, if they were uſed in the daily ſervice of the Houſe, and not kept for Ornament onely; and alſo, Pots, Pans, Spits, Racks, and the like: and laſtly, Coaches by ſome are held to paſs by the name of houſhold-ſtuff. *Menoch. de præſumpt.*

li.4. præſump.160. num.8, 16, 17 and 19. And Præſump. 122. num. 21. Panor. Conſil.88. vol.2. num.3. Swin. part 7. ſect. 10.

200. But Apparel, Books, Weapons, Artificers Tools, Cattle, Victuals, Corn in the Barne or Granary, Waynes, Carts, Ploughs, *&c.* and Veſſels affixed to the Free-hold, do not paſs by the name of Houſhold-ſtuff. *Menoch. de Præſump. li. 4. Præſump. 160. num. 29 and 33. Labeo, and Gloſſ. de Supellectil. Swin. part 7. ſect. 10.*

201. If the Teſtator having ſtore of young Colts, willeth his Executor to give to *A B* two Colts of the age of two years, and after the making of his Will liveth many years; in this caſe there is due to the Legatary two of the firſt Colts, which were extant at the time of the Will making, and not of the laſt Colts at the time of his death. *Franc. Mantica de conject. ult. volunt. li. 3. tit. 11. Menoch. de Præſump. 127. num. 6. li. 4. Swin. part 7. ſect. 11.*

202. And

202. And if the Teſtator bequeath to *A B* all his Goods, which are in ſuch a place, and afterwards he brings more Goods thither, and then dyes; here the Legatary ſhall have onely thoſe Goods which were there when the Will was made, and not thoſe Goods too which were brought thither afterward. *Menoch de Præſump.* 127. *num.* 29. *li.* 4. *Swin. part* 7. *ſect.* 11.

203. But if the Teſtator had ſaid, I bequeath to *A B* all my Goods which ſhall be in ſuch a place, or all my Goods which may or can be found in ſuch place; here all the Goods in that place at the time of the Teſtators death, are due to the Legatary, though they were brought thither by the Teſtator after the making of his Will. *Franc. Mantica de conject. ult. Volunt. li.* 3. *tit.* 11. *num.* 12. *Menoch. de Præſump.* 127. *num.* 87. *li.* 4. *Swin. part* 7. *ſect.* 11.

204. If the Teſtator bequeath to

A

A B his Heard of Cattle, and there is but one left at the time of his death; in this caſe the Legatary can recover no more. *Swin. part 7. ſect 11. Simo. de Prætiſ. de Interp. ult. Volunt. li. 4. fol. 179. Dubit. 9. num. 45.*

205. Where the Teſtator doth bequeath to *A B* the Corn in his Barn, and afterwards layeth up more Corn in the Barn, and dyeth before the other be thraſhed; in this caſe the Legatary can but have onely that Corn which was there at the time of the Will making; but if that be all ſpent before the Teſtators death, then he may recover as much of the new Corn, but no more. *Fulb. fol. 41. Plo. Co. fol. 341. Maſcar. de Probat. Concluſio 1280. num. 32, 33. Swin. part 7. ſect. 11. Cowels Inſt. pag. 145.*

206. So note, that it appears by theſe caſes, that ſometimes the Teſtators death is to be taken notice of, and ſometimes the making of the Will is to be reſpected in the recovery of Legacies: but in theſe and all

all other caſes, the Teſtators meaning is chiefly to be inquired after. *Franc. Mantic. de conject. ult. volunt. li.3. tit.11. num.22,23,24. tit.19.num. 1,2,3,4. Swin. part 1.ſect.3. num.19. and part 7. ſect.11.*

207. If the Teſtator bequeath all his cleer goods after Debts paid, *&c.* to his Brother and his Children; in this caſe the Father ſhall have half of the cleer Goods, and the Children the other half: for it is a Rule, that where divers perſons are comprehended under one Name collective with another third perſon; then all they which be included under that one Name, do repreſent but one onely perſon, as in this caſe, and ſhall have but a Moyety amongſt them; unleſs it be proved that the Teſtators meaning was that the Goods ſhould be equally divided amongſt them; or, that he expreſſed it ſo in his Will. *Paul. de Caſtr. ſect. de Hæred. Inſtit. Fra. Mantica de conject. ult. vol. li.4. tit.9. Swin. part 4. ſect.20.*

208. If

208. If the Teſtator bequeath to the Childe in the Mothers Womb an hundred pounds, in this caſe, if the Mother bring forth two or three Children at that time, the Legacy is to be divided amongſt them. *Franc. Mant. de Con. ult. Volunt. li.* 4. *tit.* 8. *num.* 4. *Swin. part* 4. *ſect.* 20. *Paul. de Caſtr. ſect. in li. Qui Filiabus.*

209. But if the Teſtator ſay, *If my Wife bring forth any Childe, I give to the ſame an hundred pounds*; here if ſhe bring forth two or three Children at that time, then every Childe ſhall have an hundred pounds, if the Teſtators Goods do ſuffice to ſatisfie the ſame; unleſs it be ſufficiently proved, that it was the Teſtators meaning, that they ſhould have no more but an hundred pounds amongſt them. *Swin. part* 4. *ſect.* 20. *num.* 17. *Text. in D. ſect.* 1.

210. If the Teſtator bequeath to the Childe in the Mothers Womb, if it be a Man-childe, two parts of

of

of his cleer Goods; and if it be a Woman-childe, then the Mother to have two parts of his cleer Goods, and the Childe but one, and afterwards the Mother brings forth two Children, both a Man-childe and a Woman-childe; in this caſe the Son ſhall have twice as much of the Teſtators cleer Goods as the Mother, and the Mother ſhall have twice as much as the Daughter: as for Example, the cleer Goods amount to ſevenſcore pounds; here the Daughter ſhall have twenty pounds, the Mother forty pounds, and the Son fourſcore pounds; whereas, if ſhe had brought fourth onely a Son, then the Son ſhould have had fourſcore and thirteen pounds ſix ſhillings and eight pence, and the Mother ſix and forty pounds thirteen ſhillings and four pence: and if ſhe had brought forth onely a Daughter, then the Mother ſhould have had fourſcore and thirteen pounds ſix ſhillings and eight pence,

and

and the Daughter forty ſix pounds thirteen ſhillings and four pence. *Franc. Mantica de conject. ult. Volunt. li. 4. tit. 9. num. 12. Swin part 4. ſect. 20.*

211. But if the Teſtator bequeath to the Childe in the Mothers Womb, if it be a Man-Child, two parts of his Goods, as aforeſaid, and the Mother one; and if a Woman-Childe, then the Mother two parts, and the Childe but one; and the Mother brings forth an Hermaphrodite, who hath both the parts of a man and a woman; in this caſe the Hermaphrodite ſhall have onely the Portion due to that Sex of which the Hermaphrodite doth moſt participate, and not the Portion due to both Sexes: and if it be doubtful of which Sex it doth moſt participate, then it ſhall be preſumed according to the more worthy kinde. *Swin. part 4. ſect. 20. num. 19. Co. on Litt. fol. 8. Phillipps pr. of Law, pag. 36.*

212. If the Teſtator give an hundred

dred pounds to the Children of *A B*, who hath four Children at that time of the Will making, and afterwards before the Teſtators death *A B* begetteth other four Children, ſo that he hath eight Children in all; yet in this caſe thoſe four only which were born when the Will was made, ſhall have the hundred pounds, and the other four ſhall have nothing out of it. *Simo. de Prætiſ. de Interp. ult. Volunt. li.4. dub.9. fol.178. Menoch. de Præſump. li.4. Præſumptio 127. num.18.*

213. If the Teſtator bequeath an hundred pounds lying in ſuch a Cheſt to *A B*, and there is no Mony in the Cheſt; here the Legacy is void, unleſs the Teſtator ſay, I give to *A B* an hundred pounds, and I will that the ſame be paid out of the Monies which I have in ſuch a Cheſt, or of the Mony which ſuch a man doth owe me; in ſuch Caſe, although there be no Mony in the Cheſt, nor any due by the perſon named by the Teſtator, yet the Legacie is due, and ought

ought to be paid out of the Teſtators Goods. *Swin. part* 7. *ſect.* 5. *num.* 15. *Mich. Graſſ. theſaur. com. opin. ſect. Legat. quæſtio* 59. *num.* 3.

214. And where the Teſtator doth bequeath ten pounds to *A B* remaining in ſuch a Cheſt, and at his death five pounds onely is found in the ſame Cheſt; in this caſe the Legacie is good for ſo much as is found in the Cheſt, and no more. *Swin. part* 7. *ſect.* 5. *num.* 15. *Paul. de Caſtr. in D. ſect. quinq; num.* 9.

215. If the Teſtator do imagine himſelf to be indebted to another perſon, and doth bequeath that debt to the ſame perſon, which he erroniouſly ſuppoſeth he oweth him, not expreſſing any ſum; in this caſe the Legacy is void: but if he ſay, *I do bequeath ten pounds to ſuch a perſon, which I owe him*, whereas the Teſtator knows he owes him nothing; yet in this caſe the Legacie is due, notwithſtanding the falſe demonſtration;

tion; and here the Teſtator is not preſumed to err, unleſs the Executor make proof of error. *Paul. de Caſtr. in li. 2. C. de falſa cauſa adject. Swin. part 7. ſect. 5. num. 14.*

216. If the Teſtator meaning to give but fifty pounds, doth give an hundred pounds; or meaning to give an hundred pounds, doth give but fifty pound: in theſe caſes the Legatary may recover as much as the Teſtator did mean and intend to give, be it more or leſs then the ſum mentioned. *Swin. part 7. ſect. 5. num. 13.*

217. If the Teſtator bequeath an hundred pounds to the Church, not mentioning what Church, it ſhall then be underſtood of his Pariſh-Church; or if he name a Church, and there be divers there of the ſame name, and none of them his Pariſh-Church; then the Executor, if he prove the Will; or the Ordinary, if he refuſeth, may beſtow the ſame on which Church he will: but if the Teſtators Pariſh-Church be of the

ſame name, it ought then to be beſtowed there. *Mich. Graſſ. theſaur. com. opin. ſect. Legat. q.64. Swin. part 7. ſect. 8. Franc. Mantic. de conject. ult. vol. li.8. tit.6.*

218. Where the Teſtator doth bequeath one half of his Goods to one perſon, and makes another his Executor, willing and appointing that all his Goods ſhall be divided betwixt them; in this caſe the Legatary ſhall have half before debts paid, and the Executor the remainder after debts paid: as, where the Teſtator hath Goods to the value of an hundred pounds, and oweth twenty pounds out of the ſame; here the Legatary ſhall have fifty pounds, and the Executor ſhall pay the twenty pounds debt out of his half. 5 *Maria, Dyer fol.*164. *Goldesborough Rep. pag.* 149. *Pl.* 74. *Hil.* 43 *El. C. B. Swin. part 7. ſect.* 10. *Cowels Inſt. pag.* 146.

219. If a man bequeath twenty pounds to *A*, and twenty pounds to

B,

, and twenty pounds to *C*, and makes his Executor, and dyes, having Goods in all but to the value of twenty pounds, of which Goods the Executor makes an Inventary; in this caſe he may pay which of the three he pleaſes his whole Legacie, and the other two are without remedy; or he may, if he pleaſe, pay every one of them a rateable part: and if in caſe the Executor make no Inventary, yet he is chargeable no further then the value of the Goods; and ſo every Legatary in ſuch caſe ſhould ſue him, they muſt prove ſufficiency of goods, or otherwiſe they ſhould get nothing. *Plo. com. fol.* 545. *in Caſe inter Parham and Yardly. Dr. and Stud. li.* 2. *cap.* 10.

220. If the Teſtator ſay, *I will that* A B *ſhall have an Horſe*; here the Election belongs to the Legatary: but if he had ſaid, *I will that my Executor give to* A B *an Horſe*, then the Election belongs to the Executor: and if the words of Election be

directed to neither of them, then the Legatary ſhall make the Election, if there be any ſuch thing extant amongſt the Teſtators good as is bequeathed; and if not, then the Executor is to make the Election: and in caſe where the Legatary chuſeth, he muſt not take the very beſt, unleſs there be no more but two of the things extant; for then he may chuſe the beſt, and ſo he may do when the Teſtator grants him the Election; and as the Legatary may not chuſe the beſt, neither may the Executor obtrude the worſt of thoſe things extant; and where there is no ſuch thing extant, then the Executor is to provide a competent thing for the Legatary. *Mich. Graſſ. theſaur. com. opin. ſect. Legat. q. 62. num. 2 and; Minſ. in D. ſect. ſi generaliter, num. Swin. part 7. ſect. 10. Co. on Litt. fo.* 144. *b.*

221. If the Teſtator bequeath two Horſes to two Men, having no more, and one of them is a great

deal better then the other; in this caſe he that is firſt named in the Teſtament ſhall have the Election. *Co. on Litt. fol.* 144. *b.* 2 *H.*7,23. *Swin. part* 7. *ſect.*10.

222. If the Teſtator give to *A B* twenty pounds if he will, in ſuch caſe *A B* muſt expreſs his willingneſs by ſome means, or elſe the Legacy is not due; and if he die before ſuch expreſſion, then the Legacy is loſt, and ſhall not go to his Executors or Adminiſtrators, which otherwiſe it would, if no ſuch condition had been expreſſed. *Swin. part* 4. *Sect.* 6. *num.*7.

223. If an Executor have a Legacy left him by his Teſtator, and refuſeth to ſtand to the Executorſhip, in ſuch a Caſe he looſeth his Legacy. *Gribald. Theſaur. com. opin. verb. Tutor. Swin. part* 6. *ſect.*2. *in fine. Refor. Leg. Eccleſ. Tit. Teſtament. C.* 23, *and* 24.

224. But if the Executor be not duly admoniſhed to take the Execu-

orſhip upon him, then if he be the Teſtators Kinſman, or ſuch a perſon to whom the Teſtator would have given the Legacy, though he did not perform the Will, and take the Office upon him; in ſuch caſe he ſhall not looſe the Legacy then, by his refuſal of the Executorſhip; neither ſhall the Wife looſe her thirds, nor the Children their filial Portions, nor the Creditor his debt, if any of them be made Executors, and refuſe to take the Office upon them. *Swin. part 6. ſect. 3. num. 15. Sichard. in lib. Si legatarius, cap. de legat.*

225. If a man by his Will deviſe all his Lands and Tenements to *A B* in this caſe, not only all his Lands and Tenements which the Teſtator hath in poſſeſſion do paſs, but alſo thoſe which he hath in reverſion alſo, by vertue of the word *Tenements*. *Terms of the Law, verb. Deviſe. Cowels Inſt. pa. 144. Swin. part 4. ſect. 4. num. 19.*

226. But if the Teſtator have both lands

Lands in Fee, and Lands in Leaſe for years, and deviſeth all his Lands and Tenements; in ſuch caſe the Lands in Fee only paſs, and not the Lands in Leaſe for years: but if he have none but lands for years in Leaſe only, then thoſe lands ſhall paſs by vertue of ſuch deviſe. *Tr. 7 Jac. B. R. Roſe and Bartlets Caſe. Cro. 1 part Rep. fol.* 213. *Nays Maxims pag.* 99.

227. If lands be deviſed to a man to have to him for evermore, or to have to him and his Aſſigns; in both theſe caſes a Fee-ſimple doth paſs to the Deviſee: but if ſuch a Gift or Grant were made by Deed, it would carry an eſtate but for life, without the word *Heirs* were in it. *Perkins, ſect.* 557. *M.* 22 *E.* 3. *Deviſe* 20. *Terms of Law, verbum Deviſe. Swin. part* 4. *ſect.* 4. *num.* 19.

228. Alſo if a man deviſe his lands to another, to give, or ſell, or do therewith at his pleaſure; here he hath a Fee-ſimple alſo: and if lands be deviſed to one and his Heirs males, this

ſhall amount to an Eſtate in tayl; but if ſuch words be in a Feoffment, it ſhall be taken for a Fee-ſimple, becauſe it doth not appear of what body the heirs Males ſhall be begotten. *Terms of the Law, verb. Deviſe. Co. on Lit. fol. 9. b. Swin. part 4. ſect. 4. Cowel Inſt. pag.* 144.

229. Alſo if one deviſe to an Infant in the Mothers womb, it is good: but ſuch a Feoffment, Gift, or Grant is void: and if one will that his Son ſhall have his land after the death of his Wife, in this caſe the Wife (by the favourable interpretation of ſuch Will) ſhall have the land for term of her life. *Finches Law, pag.* 172. 13 *H.* 7. 13. *Terms of the Law, verb. Deviſe. Cowels Inſt. pag.* 144. *Swin. part* 4. *ſect.* 4. *Noyes Maxims pag.* 100.

230. If a man deviſe all his lands in *A.* to his two Daughters, and makes them Executrixes; and afterwards purchaſeth more lands in *A.* and then dies without a new publication of his Will, and expreſſing of this land new-

ly

ly bought therein; in this caſe this land newly bought doth not paſs by the ſame Will. *H.* 43 *El. C. B. Beckford and Parncotes Ca. Goldsboroughs Rep. pag.* 150. *pl.* 77.

231. A man having four Daughters *A*, *B*, *C*, and *D*, deviſes his lands to his Wife for her life, and after her deceaſe the ſame to be equally divided amongſt his Daughters or their Heirs; *A* one of the Daughters died before the Mother, and after the Mothers death the heir of *A* ſued for a fourth part, and adjudged for the Heir by vertue of the disjunctive (or) but if it had been to have been divided amongſt his Daughters (and) their Heirs, this word had altered the caſe, and would have given the Fee to the three ſurviving Siſters. *Mich.* 1 *Car.* 1. *B. R. Rot.* 189. *Taylor and Hodgskies Caſe, Godbolts Rep. fol.* 363.

232. If one deviſe his lands to another Man and his Heirs, and the Deviſee dieth in the life-time of the Deviſor,

viſor, and afterwards the Deviſor dieth; in this caſe the Heirs of the Deviſee ſhall not have the land. *Plo. Com. fol.* 342. *in Brett and Rigdens Caſe.*

233. If a man ſeized of lands in Fee, ſowe the ſame with Corn, and afterwards deviſeth the land to *A B*, and dieth before the Corn be ſevered; in this caſe the Deviſee ſhall have the Corn aſwell as the land: but it is otherwiſe where the lands deſcend to the Heir; for the Executors or Adminiſtrators ſhall have the Corn ſown at the Teſtators death. *Mich. 20 Jac. C. B. Spencers Caſe. Winches Rep. fol.* 51.

234 A man deviſed his Meſſuage whereof he was ſeized in Soccage in Fee, by theſe words: *I deviſe my Meſſuage where I dwelt to my Cozen* H *and her Aſſigns for eight years, and my Cozen* H *ſhall have all my Inheritances if the Law will*; and this was adjudged a good deviſe in Fee of the Meſſuage, and by the general words of the Will all the Inheritances

paſs

paſs alſo. *Mich.* 11 *Jac. C. B. Wedlock and Hardings Caſe. Godbolts Rep. fol.*208.

235. If a man deviſe his Lands to the Heirs-Males of any of his Sons or next of Kin, ſuch a deviſe is void for the uncertainty thereof. *Hil.* 2 *Car.* 1. *C. B. Rott.*1288. *in Hunt and Fiſhers Caſe*; *and Trin.*1649. *B.R.Rott.* 849. *Beal and Wymans Caſe. Styles Rep. fol.*240.

236. A man having Lands in Fee-ſimple, and Goods to the value of five pounds onely, deviſeth to his Wife all his whole Eſtate, paying his Debts and Legacies, which amounted to forty pounds; in this caſe it was adjudged that all the lands did paſs by the deviſe, and that the Wife had a Fee-ſimple in the lands, the word (paying) enforcing it; for they are to be paid preſently, which cannot be if the land paſs not in Fee. *Tr.* 1651. *B. R. Kirman and Johnſons Caſe. Styles Rep. fol.* 293. *and ſee* 29 *H.* 8. *Bro. Teſtament.*18.

237. *A*

237. *A* ſeized of three Houſes, and other Lands, Paſtures and Meadows in *W* in the County of *H*, and of Land in the County of *O*, deviſed in this manner, *viz. I give my Capital Meſſuage in the County of* O, *and all other my Lands, and Meadows, and Paſtures in the Pariſh of* W, *to ſuch an one*; and adjudged here that all the houſes paſſed by the deviſe; for that *lands* comprehends houſes alſo. *Ewer and Heydons Caſe. Abr. Mores Rep. pag.* 103. *pl.* 468.

238. If a man deviſe the profits of his lands, it is a deviſe of the lands themſelves. *Tr.* 16 *Jac. C. B. Kott.* 465. *Balder and Blackbornes Caſe Brownlo.* 1 *part* 79. *Owens Rep.* 66 *Tr.* 23 *Car. Styles* 81.

239. A man by his Will deviſeth his lands to his Wife; and if ſhe have Iſſue by the Deviſor, that his Iſſue ſhall have it at his age of twenty one years; and if the Iſſue die before that age, or before his wife, or if ſhe hath no Iſſue, that then ſhe ſhall chuſe

two

two Attorneys; and ſhe to make a Bill of ſale of any lands to her beſt advantage: In this caſe it was reſolved, that the wife hath thoſe lands for life; and ſhe having no Iſſue, hath not any intereſt to diſpoſe, but hath an authority to nominate two who ſhall diſpoſe of the lands, and they ſhall make ſale of them. *Mich. 5 Jac. B. R. Beal and Shepherds caſe. Bro. 2 part Rep. fol.* 199.

240. I might go on to ſhew what words in a Deviſe make a Condition, and what a Limitation; and where an eſtate ſhall paſs by Implication; and what words make an eſtate Tayl, Fee-ſimple, or for Life; and where the Deviſees ſhall be Joyntenants, and were Tenants in Common, with ſeveral other things; but it not being the intent of this Treatiſe, I refer the Reader to the learned Reports now extant, where he may be ſatisfied: and ſo I return again to my purpoſe.

141. Deviſes and Legacies are to be

be ſued for in the Eccleſiaſtical Court, but the Ordinary cannot take Cognizance of Fees or Free-hold deviſed; but a Prohibition will lye, if any Judge of any Spiritual Court ſhall cite one before him in caſe of ſuch a deviſe as intrencheth upon the Common Law. *Perkins, ſect.* 576, 579. *and Dr. and Stud. li.*2. *cap.*55. *Cowels Inſt. pag.*146.

242. Note, there may be much deceit uſed by a knaviſh Executor; and though the Goods be of a great value after the Debts are paid which were truely owing and due by the Teſtator, yet he may keep the Legacies, and never pay them perhaps, but pretend that all the Debts are not paid; and thereupon may cauſe Strangers to ſue, and then alledge that there are more Suits againſt them then the Goods of the Teſtator are ſufficient to ſatisfie; or they may confeſs the Actions brought againſt them; and ſeveral other ways there are whereby they may defraud the

the Legatees of their Legacies: Therefore it were good for Teſtators in their life-times, either to ſecure the Legacies to the Legatees by ſome ſure means, or otherwiſe in their lifetime to deliver the ſame, that they ſee them poſſeſſed thereof, and not leave it to the Will of the Executor. *Perkins, ſect.* 571.

CHAP. IX.

Several Caſes concerning the Duty of an Executor.

143. THere are three kinds of Executors, or perſons which have to deal with the Execution of dead mens Wills, and diſpoſition of their Goods: The firſt hath his Authority from the Law, and that is the Biſhop or Ordinary of every Dioceſs, who hath the execution thereof, when no Executor is appointed

ted by the Teſtator, or where the Executor doth refuſe to take the Office upon him. *Jo. de Canibus Tract. de Executoribus, ult. vol. par.* 1. *q.* 3. *Swin. part* 6. *ſect.* 1. *num.* 2.

244. The ſecond hath his Authority from the Biſhop or Ordinary, and is he whom we call an Adminiſtrator, and is put in where the Executor named refuſeth, or cannot be Executor, or when no Executor is named in the Will; and if there be a Will, then it muſt be annexed to the Letters of Adminiſtration: and ſuch Adminiſtrator is chargeable with the performance of the Will, as if he had been appointed by the Teſtator. *Bro. Teſtament* 20. *and Deviſ.* 35. 31 *E.* 3. *cap.* 21. *and* 21 *H.* 8. *cap.* 5. *Swin. part* 6. *ſect.* 1.

245. And laſtly, the Executor who derives his power from the Teſtator, is he that is named Executor in the Teſtament; to whom the Execution of the Teſtament is committed by the dead man, and is called

Execu-

Executor teſtamentarius, and hath his Authority immediately from the Teſtator, and may without the Authorty of the Ordinary enter to the Teſtators Goods and Chattels; and after Probation of the Teſtament, may alſo Commence Suit againſt the Teſtators Debtors. *Plo.com. in Caſe inter Griesby and Fox. Bro. Executor* 49. *Swin. part 6 ſect. num.* 4. *Minſin. in tit. de Hæred. Inſt.*

246. When the King is made Executor of the Teſtament of another perſon, he doth not take the office upon him, but appoints certain perſons to take the Execution of the Will upon them, (againſt whom ſuch as have cauſe of Suit may bring their Action) and others he appoints to take the accounts, as appears in the Caſe of *Catharine* Queen-Dowager of *England*, Mother to *H.* 6. who conſtituted King *H.* 6. her ſole Executor; and he appointed certain perſons to take the charge of the Will upon them, and others to take their

Accounts. *Vide Rott. Parliamen. 15 H.6. num.32. Co. 4 part Inſt. fol. 335.*

247. VVhen a man makes ſeveral Executors, and they live in divers Dioceſſes, they ſhall all receive ſuch benefit as accrews to them by the Teſtament, onely by the Authority of that Judge who confirmed the Teſtament to them; and the ſame courſe is to be taken by the Adminiſtrators who live in ſeveral Dioceſſes. *Refor. Leg. Eccleſiaſt. tit. Teſtament. cap.37.*

248. Now the Office of an Executor Teſtamentary, doth conſiſt in two things; that is, either in accepting or refuſing the Executorſhip; upon both which parts there are ſeveral Caſes hereafter following in this Chap'er, very neceſſary for all Executors to know.

249. If he that is named Executor be cited to appear before the Ordinary, and do refuſe to accept the Executorſhip, or will not appear; then

the

the Ordinary or other Judge may commit the Adminiſtration of the Goods of the deceaſed, as if he had dyed inteſtate: but if the Executor afterwards be willing to undertake the Executorſhip, then the Ordinary may revoke the Adminiſtration before committed: but mean acts done by the Adminiſtrator, until the Executor undertake, are good and effectual in Law. *Bro. Exer.* 49. *and* 101. *and Admin.* 32 *and* 33. 31 *H.* 8. *cap.* 5. *Vide Griesbie and Foxes Caſe, Plow. com. fol. Swin. part* 6. *ſect.* 2.

250. Note, that the Executor cannot be compelled to undertake the Office, unleſs he have already medled with the Teſtators Goods as Executor; for then he may be compelled to it: and if notwithſtanding he do ſtill refuſe, and the Ordinary do commit the Adminiſtration to him; his refuſal is void, and he ſhall be charged as Executor. And when one ſhall be ſaid to meddle with Goods

as Executor, and when not, is ſhewed afterwards in this Chapter. *Fitz. Abr. tit. Exec. num.* 35. *Olden de Exec. ult. Volunt. tit.* 7. *in fine. Swin. part* 6. *ſect.* 2. *Noyes Maximes, pag.* 102. *Hernes Law Convey. pag.* 87.

251. VVhere a term is deviſed to an Executor, who enters, and dyes before Probat; yet in ſuch Caſe the entry is good Executorſhip, and his Adminiſtrator ſhall have it. *M.* 2[illegible] *El. Dyer, fol.* 367.

252. Note, that every one to whom the Teſtator was indebted, ſhall have an Action againſt the Executor, ſo long as the Executor hath Aſſets in his hands; but a Debt due to the Teſtator ſhall not charge the Executor as Aſſets till he have received it. *Terms of the Law, verb. Executor. Br. Exec. num.* 112. *Swin. part* 6. *ſect.* 3.

253. VVhere there be divers Executors, the Actions Commenced by them ought to be in all their names;

and

and ſo muſt the Action that is Commenced againſt them, name them all; except it be in Caſe where ſome of them refuſe to take the Office, and the others onely prove the Will; for in ſuch Caſe in Actions brought againſt them, thoſe onely which prove the Will may be named, and the other left out. *Bro. Exec.* 117. *Co.* 9. *lib. Rep. fol.* 40. *Noyes Max. pag.* 102. *Swin. part* 6. *ſect.* 20. *Perkins, ſect.* 485.

254. If divers be made Executors, and ſome of them refuſe, yet he which refuſeth may releaſe any debt (before Judgement) which was due to the Teſtator; and it is as good as if he had never refuſed, and ſo a ſufficient diſcharge to the Creditor; for every Executor hath an intire intereſt: and therefore if two as Executors have a term, and one of them grants all that to him appertains; in this Caſe the intire Term ſhall paſs. *Co.* 5. *li. fol.* 28. *Bro. Exec.* 38, 117. *Dyer, fol.* 23 *and* 319.

Swin. part 4. *sect.* 20. *Noyes Maximes, pag.* 101, 102. *Perkins, sect.* 485.

255. But one Executors releasing of Debts, or selling of Goods, shall not charge the other to pay so much of the Goods, if there be not enough to pay Debts; but it shall charge the party himself that did so release or convey. *Hernes Law Convey. pag.* 87.

256. Note, that the Executor which refuses, may joyn at any time when he will; yea, though it be not till after the death of the other Executor, who proved the Will; contrary to the opinion of *Broke*; and so the Quere in *Dyer* is well resolved. 42 *El. Henslowe Ca. Co.* 9. *li. fo.* 39. *Perkins, sect.* 485. *Dyer, fol.* 360. *num.* 42. *Bro. Exec.* 92, 99 *and* 149. *Swin. part* 4. *sect.* 20. *and part* 6. *sect.* 3.

257. But if divers be made Executors, and they all refuse before the Ordinary, and he grants Administration to another; in such case they cannot then afterwards prove at any time

time: ſo note the diverſity between one refuſing, and all refuſing. 42 *El. Henſlowes Ca. Co.* 9. *li. fol.* 39. 36 *H.* 6. *Finches Law, pag.* 171. *And Vide Bewacorne and Caters Caſe, Mores Rep. fol.*

258. If two be appointed Executors, and one of them refuſes, and the other takes the Office upon him, and then dyes, and makes his Teſtament, wherein he names the Executor; in this caſe the Executor of the Executor cannot joyn with the ſurviving Executor, neither in the execution of the firſt Teſtators Will, nor in Suits or Actions: and if the Executor of the Executor have any Goods in his hands of the firſt Teſtators, the ſurviving Executor may have an Action againſt him for the ſame: and if the ſurviving Executor do afterwards dye inteſtate, yet cannot the Executor of the Executor meddle with the Goods of the firſt Teſtator; but Adminiſtration thereof is to be committed to the next of Kin to the

Teſtator: and if the Executor of the Executor, or who dyed firſt, meddle with the Goods, then he may be ſued by the Creditors as Executor in his own wrong. *Bro. Exec.* 92, 99, 149, 160. *Swin. part* 4. *ſect.* 20.

259. If one make another his Executor, and dyeth; and the Executor before he hath proved the Will, maketh another his Executor, and dyeth; in this Caſe Adminiſtration of the firſt Teſtators Goods, with the Will annexed, ſhall be committed to the next of Kin of the firſt Teſtator, and not to the Executer of the Executor, unleſs the firſt Teſtator did bequeath his Goods (as his Debts, Funeral-expences, and Legacies paid) to the Executor named in the Teſtament; and then in ſuch caſe the Adminiſtration of the firſt Teſtators Goods is to be committed (with the Will annexed) to the Executor of the Executor. *Dyer, fol.* 372. *num.* 42. *M.* 23 *El. Iſteds Ca. Swin. part* 6. *ſect.* 3

260. Note,

260. Note, that if divers be appointed Executors, and one of them doth ſell ſome of the Teſtators Goods for a ſum of money; then that Executor which ſold the Goods may ſue alone for the money due for the ſame. *Swin. part* 4. *ſect.* 20. *Bro. Exec. num.* 65.

261. Where divers perſons are made Executors, and the Teſtator gives them power to ſell his Lands; in this caſe, though ſome of them dye, or do refuſe the Executorſhip, yet the others who take upon them the charge and burden of the ſame Teſtament and Will, may ſell the Lands, except in ſome Caſes. *Perkins, ſect.* 545. *Paſch.* 46 *E.* 3. *Deviſe* 8. 21 *H.* 8. *cap.* 4. 39 *Aſſ. pl.* 17. *Co. on Litt. fol.* 113. *Swin. part* 6. *ſect.* 3. *Dyer, fol.* 371. *See Howel and Barnes caſe, Mich.* 10 *Car.* 1. *Cro.* 1 *part.*

262. As, where the Teſtator Deviſeth, that after his death his Lands ſhall be ſold by his Executors, with the aſſent of *A B*; maketh his Wife and

and a Stranger his Executors, and dyeth, and then the Wife dyeth, and *A B* alſo; in this Caſe the Authority of ſelling the Lands is extinct, and gone by the death of *A B*, without whoſe conſent it cannot be ſold; and therefore if the ſurviving Executor ſhould ſell, ſuch ſale is void. *Brownlowes 2 part Rep. fol.* 100. *Mich. 5 Eliz. Dyer fol.* 219. *Fulb. fol.* 41. *Swin. part 6. ſect.* 3.

263. But if a man Deviſe by his Will that *A B* and *C D*, whom he makes his Executors, ſhall ſell his Land for payment of his Debts, and they refuſe to be Executors; yet notwithſtanding they may ſell the Lands, becauſe they are named by their proper names; or, if one of the Executors dyeth, and the other taketh upon him the Executorſhip, and afterwards ſelleth the Lands, ſuch ſale is good. 15 *H.* 7, 12. *Perkins, ſect.* 548. 19 *H.* 8, 9. *Swin. part* 6. *ſect.* 3.

264. But where a man by his Will maketh *A B C* and *D* his Executors,

De-

Deviſes his Lands to the ſaid *A B C* and *D* by their ſpecial names, and to their Heirs, and further deviſeth that the Deviſee ſhall ſell his Lands for payment of his Debts, and one of the Executor refuſes to intermeddle; in this caſe it hath been held that this being a ſpecial and joynt intereſt, the other three Executors thereupon cannot ſell without their Companion. *Mich. 29 Eliz. B. R. Bonnifant and Sir Rich. Greenfields caſe. Godbolts Rep. fol. 77. And ſee 26 El. B. R. Vincent and Lees caſe. Co. on Litt. fol. 113.*

265. My Lord *Cooks* advice is to ſuch who deviſe by their Wills their Lands to be ſold, that they make it as certain as they can ſay, that the ſale be made by his Executors, or the Survivor or Survivors of them, if his meaning be ſo; or by ſuch or ſo many of them as take upon them the Probat of the Vvill, *&c.* and it is better to give them an Authority then an Eſtate: unleſs his meaning be they ſhould

ſhould take the profits of the Lands in the mean time; and then it is neceſſary that he deviſeth that the mean profits be aſſets in their hands; for otherwiſe they ſhall not be Aſſets. *Co. on Litt. fol.* 113.

266. If a man deviſe his lands to be ſold by his Executors, and to diſtribute the profits to Pious uſes, yet after the death of the Teſtator, the Inheritance ſhall deſcend to the Heir, and ſhall remain in him until the Executors ſell the ſame; and the Heir ought to receive the profits thereof till the time of the ſale: but if the Teſtator deviſe his lands to his Executors, which he willeth to be ſold, and the money to be diſtributed to Pious uſes, here the Executors after the Teſtators death ſhall receive the Profits, and not the Heir; for in the firſt caſe the Executors have only an Authority to ſell, and in the laſt caſe they have the frank-Tenement. *Brownl. 2 part. Rep. fol.* 136. *Noye Max. pag.* 100, 101. 38. *Aſſ. Pl.* 3. *Per-*

Perkins ſect. 541, *and* 543. *Swin. part* 6. *ſect.* 3. *num.* 7. *Cowels Inſt. pag.* 139.

267. Note that the Executor of an Executor cannot ſell the land of the firſt Teſtator, who by his Teſtament gave power to his Executor to ſell the ſame, but it ſhall go to the Heir, unleſs the Will be otherwiſe. *Bro. Tit. Executor* 3. *Perkins ſect.* 507, 554. *Swin. part* 6. *ſect.* 3. *num.* 11. *in fin.*

268. If a man willeth that his Executors ſhall joyntly ſell his land, or that his Executors and his Feoffees ſhall joyntly ſell his land; in ſuch caſe, if one Executor ſell to one, and the other to another; or if the Executors ſell to one, and the Feoffees to another, and afterwards they joyn in the ſale to a third perſon, in ſuch caſe the laſt ſale onely is good, and the other voyd. *Perkins ſect.* 546 *and* 553.

269. If a man willeth his lands ſhall be ſold for the payment of his Debts, and expreſs not by whom it ſhall be ſold

ſold, then the Executors ſhall ſell it: but if he willeth his land to be ſold, and expreſs not by whom, nor for what; in ſuch caſe it hath been held that ſuch Deviſe is void, and the land ſhall not be ſold, but deſcend to the Heir. *Perkins ſect.* 547. 15 *H.*7. 12.

270. The Executors or Adminiſtrators of Tenants in Fee-ſimple, Fee-Tayl, and Tenants for term of life, of Rent-ſervices, Rent-charges, Rent-ſects, and Fee-farms, by the *Stat.* of 32 *H.*8. may either diſtrain, or have an Action of Debt againſt ſuch Tenant as is behind and in Arrear to the Teſtator at the ſame time of his Death, for ſuch Arrearages of Rent as ought to have been paid to the Teſtator in his life-time; and if the Tenant who was in arrear be dead, then they may have an Action of Debt againſt his Executors or Adminiſtrators for ſuch Arrearages. The Husband alſo who is ſeized in right of his Wife of any Eſtate in Fee-ſimple Fee-tayl, Fee-farm, where any ſuch Rents

Rents are behind in the Wives life (whether it be before or after Marriage) and unpaid at the time of her death, may have the like remedy; and ſo may his Executors or Adminiſtrators. *Co. on Lit. fol.* 351. *b.* 32 *H.* 8. *cap.* 37. *Swin. part* 6. *ſect.* 3 *num.* 8. *Paſc.* 23 *Eliz. Dyer fol.* 375.

271. Actions of Account were given to Executors by the *Stat.* of *Weſtmin.* 2. and Actions of Treſpaſs done to their Teſtator, as for his goods and Chattels carried away, were given by the 4 *E.* 3. 7. and by the 25 *E.* 3. Executors of Executors have Actions of Debt, Account, and of goods carried away of the firſt Teſtators; and Execution of Statute-Merchants and Recognizances made to him, and are alſo lyable to the Actions of thoſe to whom the firſt Teſtator was indebted, ſo far as the goods of the firſt Teſtator will extend; but the Goods which did belong to the firſt Teſtator ſhall not be put in Execution for the Debt of the ſecond Teſtator. *Wingate Abr. Stat.*

Stat. Tit. Executors. Co. 2 part Inſt. fol. 404. *Finch pag* 173. *Noyes Max. pag.* 102. *Weſtm. 2. c.* 23. 25 *E. 3. c.* 5. 4 *E. 3. c.* 7. *Swin. part* 6. *ſect.* 3. *Plo. Com. fol.* 286, 287.

272. Note that one Executor cannot ſue another for the poſſeſſion of the Teſtators goods; for the poſſeſſion of one is as the poſſeſſion of both, and therefore one of them hath no remedy againſt the other but in Chancery, unleſs there be a Legacy left unto one of them in particular, and then he may ſue for that. *Swin. part* 4. *ſect.* 20. *num.* 14. *Bro. Exec.* 98. 104. *F. N. B. Exec.* 32. *Plo. Co. fol.* 343. *Swin. part* 6. *ſect.* 3. *num.* 20. *Tothils Rep. pag.* 8.

273. If an Infant be made Executor, Adminiſtration *durante minori ætate* may be committed to the Mother or other Friend of the Infant which ſhall ceaſe and be void when the Infant comes to the age of ſeventeen years. 41, 42 *El. C. B. Prince caſe. Co.* 5 *lib. fol.* 29. *Noyes Max. pag.* 105.

274. But

274. But this Adminiſtrator during ſuch Minority, cannot ſell or Alienate any of the Goods of the deceaſed, unleſs it be upon neceſſity; as for the payment of the deceaſeds Debts, or that the goods would otherwiſe periſh; for he hath his Office of Adminiſtrator, *Pro bono & commodo Infantis*, and not for his prejudice; and cannot pay Legacies, unleſs there be aſſetts to pay debts; neither can he let a Leaſe for a longer time then whileſt the Executor ſhall be under age. *Noyes Max. pag.*106. *Co.* 5 *li. Rep. fol.*29.

275. If a man make two Executors, one of ſeventeen years of age, and the other under; in this Caſe Adminiſtration during the Minority of the other is void, becauſe he of ſeventeen years of age may execute the Will; and therefore if ſuch Adminiſtrator ſhould bring any Action, the Executor of ſeventeen years of age may well releaſe the Debt. *Piggot and Glaſcoignes ca. Brownl.* 1 *part Rep. fol.*46.

276. And if a Woman under the age of ſeventeen years be made Executrix, and the Adminſtration is committed *duranteminori ætate*, and then ſhe takes an Husband of full age; in ſuch caſe the Adminiſtration ſhall ceaſe. *Co.5 li. Rep. fol.29.*

277. An Infant-Executor upon payment or ſatisfaction to him of any of the Teſtators Debts, may give a diſcharge for the ſame; and it is a good bar againſt him afterwards: but if he ſhould give a releaſe without payment or ſatisfaction; in ſuch Caſe he is not barred from the recovery thereof afterwards by ſuch releaſe. 28 *El. B. R. Ruſſels ca. Co.5 li. fol.27. Tr. 13 Car. 1. B. R. Kniverton and Lathams ca. Cro. 1 part Rep. fol.* 35: 353. *Noyes Max. pag.*106.

278. If a woman during the Coverture be named Executrix, ſhe alone can neither ſue nor be ſued without her Husband; but ſhe alone may do any extrajudicial act, as the paying of Debts or Legacies, or the receiving

ceiving or releaſing of any Debts due to the Teſtator; and ſo may her Husband alone without her, though ſhe alone be Executrix; which acts of his ſhall not onely binde her during Marriage, but after alſo, if ſhe outlive him. *Co.* 5 *li. fol.* 27. *F. N. B. Exec.* 23, 30. *Bro. eod. tit. num.* 147, 151, 152, 178. *Kellowayes Rep. fol.* 127. *num.* 74. *Swin. part* 5. *ſect.* 1. *part* 6. *ſect.* 3. *num.* 17.

279. An Executor may releaſe an Action before Probat, although that before Probat of the Will he may not have an Action; but if *B* releaſe, and after take Adminiſtration, that ſhall not bar him; for the right of Action was not in him at the time of the releaſe, as it was in the Executor. 1 *Jac. C. B. Middletons caſe. Co.* 5 *li. fol.* 28. *Perkins, ſect.* 482. *Tr.* 7 *H.* 4. 8. *Glan. li.* 7. *cap.* 7. *Fleta, li.* 2. *cap.* 27. *Co. on Litt. fol.* 292. *b.* 18 *H.* 6, 23. *Hernes Law of Con. pag.* 86. *Cowels Inſt. pag.* 119.

280. If an Executor take in the

Teſtators Bond from one of the Creditors, and gives his own Bond for the Money; or, if the Teſtators Creditor be indebted to the Executor in ſo much as the Teſtator was indebted, and the Executor releaſes to him; in both theſe Caſes it is a good Adminiſtration by the Executor, and they ſhall not be charged as aſſets in his hands, although in the firſt Caſe he get a longer day of payment. *Paſc.* 30 *El. C. B. Stampe and Hutchings caſe. Leonards Rep.* 111, 112. *See Bryers and Goddards caſe. Hob. Rep. fol.* 250. *And Arluſh and Collinſons caſe. Claytons Rep. pa.* 88. *pl.* 148.

281. But if the Executor plead fully Adminiſtred, and give in evidence Bonds cancelled and taken in, or Acquittances for Money; this will not ſerve, unleſs there be proof of real payments made upon ſuch Bonds and Acquittances, or of new ſecurity given. *Lent-Aſſize*, 24 *Car.* 1. *apud Ebor. Scotts caſe. Claytons Rep. pag.* 112 *pl.* 193. 282. If

282. If there be divers Executors, and they are all ſued, and one of them onely pleads, yet Judgement ſhall be againſt them all, but the coſts ſhall be againſt him which pleads, if the other do confeſs or ſuffer judgement to go by default. *Brownl. 2 part, pag.* 274. 17 *E.*3,45.*b. And See Tr.* 10 *Jac. C. Banc. Lawry and Aldreds caſe. Brownl.* 2 *part Rep. fol.*183, 184, 185, 186,187.

283. If an Executor be ſued by one of the Teſtators Creditors, and he plead fully Adminiſtred, and the Jury finds aſſets in his hands, though they be but to a ſmall value, yet he ſhall be condemned in the whole debt becauſe of his falſe plea. *M.* 4 *Jac. B.R. Mary Shiplyes ca. Co.*8 *li.fol.*134. *Clerk of the Aſſize, pag.*65.

284. If the Executor promiſe to pay a Debt of the Teſtators, this ſhall binde him, though he have not aſſets. *Summer-Aſſize* 16 *Car.* 1. *apud Ebor. Smiths ca. Claytons Rep. pag.*85. *pl.*141.

285. An Executor is not chargeable with a collateral promiſe made by the Teſtator, unleſs there were a breach of it in the Teſtators lifetime. *M.* 1649. *Chriſtopher and Howes caſe. Styles Rep. fol.* 141. *And Paſc.* 1650. *B. R. Styles Regeſt. Practicale, pag.* 121.

286 If the Creditor make his Debtor his Executor, in this Caſe the Debtor proving the Will, the Debt is thereby extinguiſhed: or, if the Creditor make his Debtor and another Executors, here though the Debtor dye before he Adminiſter as Executor, the other Executor who was not indebted ſurviving; yet in this Caſe the ſurviving Executor ſhall not have an Action for the ſame Debt againſt the Executor of his Co-executor; for that the Action was extinguiſhed by conſtituting him Executor; &, *Actio ſemel extincta, nunquam reviviſcit. Quære. Bro. Teſtam.* 118. *Plo. com. fol.* 184. *Cowels Inſt. pag.* 207. *But ſee M.* 31 *Eliz. in B. R. Croſman and*

and Reads caſe : to the contrary, Leonards Rep fol. 320.

287. Alſo if two be bound in a Bond to one in a certain ſum of money, and the Obligee makes one of the Obligors his Executor; this is ſaid to be a Releaſe in Law of the Bond and Debt: for the Action is ſuſpended, and a perſonal Action once ſuſpended is thereby extinct. *Hil.* 11 *Jac. C. B. Fryer and Gildridge ca. Hob. Rep. fol.* 10.

288. If a Debtor makes his Creditor and another Executors, the Creditor if he not prove the Will nor adminiſter, may have an Action againſt him that doth prove the Will for his Debt; and then afterwards he may Adminiſter and take the Executorſhip upon him when he pleaſes: but if he take it upon him before he ſue for his Debt, his Action will be thereby extinguiſhed.

289. If the Executor by the Will be to pay money, and no place is appointed, the parties in this caſe to

whom it is to be paid, muſt make Requeſt to the Executor to pay it, for the Executor in ſuch caſe is not bound to ſeek the parties all over *England*, as it is in the caſe of a Bond where no place of payment is appointed. *Brownl. 1 part Rep. fol.* 46.

290. If one be bound in an Obligation with Condition to pay twenty pounds to ſuch perſon as the Obligee ſhall name and appoint by his laſt Will and Teſtament, and the Obligee afterwards makes his Will and nominates none to whom the twenty pounds ſhall be paid; in this caſe the Executor named in the Teſtament may ſue and recover the money. *M. 11 Jac. C. B. Rott.* 945. *Peaſe and Stilman againſt Mead. Brownlo. 1 part Rep. fol.* 77.

291. As to the payment of Debts by the Executor, he muſt have a care to pay them according to theſe following rules; otherwiſe it may be he ſhall be forced to pay ſome of the

Te-

Teſtators Debts out of his own proper goods, if there be not ſufficient goods of the Teſtators to pay all the Debts; therefore obſerve what follows.

292. Firſt Funeral-expences, then Debts to the Kings Majeſty, then Judgments muſt be payd; after them Statutes-Merchant and Recognizances, then Obligations; and if there be divers Obligations, he may pay which of them he pleaſes firſt; unleſs the day of payment in one Obligation be paſt, and the day of payment in the other Obligation not come; for then that is to be paid firſt where the day of payment is paſt; or unleſs one Obligation be put in ſuit, and the other not, for then that in ſuit muſt be firſt payd: and if there be two Obligations put in ſuit by two Creditors againſt the Executor, then he which firſt gets Judgment muſt firſt be paid; and in this caſe the Executor, if he will, may ſuffer Judgment in that which was laſt put in ſuit, and ſo pay him

him off first: then after these Obligations, simple Bills are to be payd; then Rents in arrear by the Testator; then Servants and Head-Workmens Wages; then Merchants Books; and lastly, Contracts by word, in which the Testator could not wage his Law, upon which the Executor may be sued in an Action upon the Case, upon the promise of the Testator. *Bro. Exec.* 172. *Dr. and Stud. Li.* 2. *C.* 10. *Dyer fol.* 32. *Mag. Charta C.* 18. *Co.* 2 *part Inst. fol.* 32. *Cowels Inst. pag.* 150, 151. *Herns Law con. pag.* 87. *Noyes Max. pag.* 104. *Co.* 3 *part. Inst. fol.* 202. *Swin. part* 6. *sect.* 16. *See M.* 32 *El. C. B. Pemberton and Barham's case, and* 43 *El. B. R. Bearblock and Reads ca. vouched in the Sadlers case. Co.* 4 *lib. and Harrisons case* 40 *El. C. B. Co.* 5 *lib. fol.* 28. *Terms of the Law ver. Executor. Bro. Exer.* 33, 87, 127, 163. *Mich.* 9 *Jac. C B. Puncheon and Legates case. Brown.* 2 *part Rep. fol.* 137. *and Co.* 9. *lib. fol.* 86. *the same case. M.* 42. 43 *El. B. R. Littleton*

and

nd Hebbens Ca. Cro. 1 part. Rep. ol.

293. The Executor is not chargeble for a Treſpaſs done by the Teſtator, nor for his receit for Rents, or for occupation of Lands, as Bayliff or Guardian in Soccage; for this s no duty certain. *Noys Max. pag.* 03.

294. If Executors or Adminiſtrators have not Aſſets in their hands to ay all the Creditors, according to heſe former Rules; then they muſt ay in order as far as the Goods and Chattels of the Teſtator will extend, nd the reſt are without remedy: but f they pay Debts to others before Debts to the King, or Bonds before udgments, or Shop-Books before Bonds, *&c.* then they muſt pay the ame over again, if there be not ſufficient left to pay them who ought o have been paid according to the ame order, and were omitted. *Hernes Law Conv. pag.* 87.

295. If the Teſtator were indebted

to

to the Executor, he may allow his own Debt before he pay other Creditors to whom the Testator was indebted in the like manner as he was to the Executor, be it by Statute, Bond, or otherwise; in case he have made an Inventary, and that he be not Executor of his own wrong; for every Creditor by such means, when the Goods be not sufficient to pay all, would strive to make himself Executor of his own wrong, to satisfie himself, and bar others; an Administrator also may stop his own Debt. *Plo. com. in Woodward and Darcyes case. M.40.41 El. B. R. Coulters case. Co. 5 li. fol. 30. Ma. 6 Jac. C. B. Alexander and Lambs case. Brown. 1 part Rep. fol. 103. Swin. part 6. sect. 16. Plo. com. fol. 184.*

296. If the Testator be indebted to one in forty pounds, and the Executor pays but twenty pounds, and gets an Acquittance for the whole forty pounds; yet this Acquittance shall not prejudice any other Creditor but

but for twenty pounds onely, and the other twenty pounds ſhall be aſſets in the Executors hands ſtill. 8 *Jac. C. B. Turners ca. Co.* 8 *li. fol.* 132. *Bro. Exec.* 6. *Swin. part* 6. *ſect.* 16.

297. If a man Deviſe his Lands for three years to his Executors for the payment of his Debts, this ſhall be aſſets in the Executors hands: but if a man Deviſe his Lands to be ſold for the payment of his Debts, it is no aſſets till it be ſold, unleſs he expreſs it to be ſo in his Will. *Paſc.* 9 *Jac. C. B. Brownl.* 1 *part Rep. fol.* 34. *Hil.* 10 *Jac. C. B. Brownl.* 2 *part fol.* 47.

298. If a man make a Leaſe for years of a Houſe, *&c.* reſerving Rent, and the Executors after the Teſtators death receives the Rent, yet it is no aſſets in their hands; for the whole Rent belongs to the Heir. 20 *El. Dyer, fol.* 362. *Plo. com. fol.* 114 *and* 259.

299. If an Executor or Adminiſtrator make gain of the Teſtators Money,

Money, that gain ſhall be aſſets in his hands. *Brownlowes 1 part Rep. fol. 77.*

300. If an Executor pay Funeral expences, or Debts of the Teſtator with his own Money; he may retain goods of the Teſtators to the ſame value, and they ſhall not charge him as aſſets in his hands. *Cleydon and Spencers ca. Mores Rep. fol. pl.; Hernes Law Con. pag. 88. Noyes Max. pag. 104. Swin. part 6. ſect. 16. Dyer, fol. 2. and fol. 187.*

301. Note, where it is ſaid before *pl.* 284. that an Action lies againſt an Executor, upon his promiſe to pay a Debt of the Teſtators; yet there ought to be a good conſideration to ground the *Aſſumpſit* upon, which muſt be either an advantage to the Executor, or a damage to the Creditor (as forbearance till ſuch a time, *&c.*) or elſe the Action will not hold. *M. 2 Jac. B. R. Fiſher and Richardſons caſe. Cr. 2 part Rep. fol. 47. & P. 10 Jac. B. R. Booth and Crompton's caſe.*

caſe. Cro. 2 part fol. 613. and H. 16. Jac. Bogge and Melins caſe. Huttons Rep. fol. 27.

302. If Judgment be given againſt Executors, and upon a *fieri facias* the Sheriff returns *Nulla bona*; in ſuch caſe the plaintiff may have another ſpecial Writ of *fieri facias* directed to the Sheriff, that he levy the Debt of the Teſtators goods, and if it appear to him that the Executors have waſted the goods; then that he levy the ſame of the Executors own proper goods. *H. 45 El. B. R Pettiſers caſe. Co. 5 lib. Rep fol. 32. and Tr. 16 Car. 1. B. R. King and Hiltons caſe. Cr. 1 part Rep. fol. 438.*

303. A man was bound in an Obligation with condition for the performance of Covenants, and dyes; after whoſe death his Executors break Covenants, and the Bond being ſued, it was moved that Execution might be of the Executors own goods, becauſe the breach of the Condition was the Executors own Act. But the Court de-

denied it, and Judgment was entred *de bonis Teſtatoris. Tr.* 17 *Jac. C. B. Kott* 1849. *Caſtilion and Exec. of Smiths caſe. Hobarts Rep. fol.* 283.

304. If an Executor or Adminiſtrator be ſued for a Debt of the Teſtators, and he knoweth of a Judgment or other Debt upon Record againſt the Teſtator; if the Executor have no more goods then will ſatisfie the ſame, then he may well plead this ſpecial matter, and it ſhall bar the party that ſues, for it ſhall be taken for a *plene Adminiſtravit*: and if the Executor ſhould pay the party that ſues before the Judgment, it will be a *Devaſtavit*, and he will be forced then to pay the Judgment out of his own proper goods, as is ſhewed before, *pl.* 292. *Hil.* 7 *Ed.* 6. *Dyer fol.* 79. P. 12 *Jac. C. B. Moon and Andrewes ca. Hobart Rep. fol.* 133. *Tr.* 15 *Jac. C. B. Rot.* 2119. *Kydd and Chynelyes caſe. Hobarts Rep. fol.* 218. *Scarlets caſe in Mores Abr. p.* 191. *pl.* 877. *and Barraclonghs c. Clayt. Rep.* 65. *pl.* 112.

305. If

305. If an Executor be not minded to take upon him the Office of Executor, then it behooves him not to meddle with any of the Teſtators Goods; for if he once Adminiſter of the Goods of the deceaſed, and make uſe of them, by ſelling the Goods, or killing any of the Cattle; or, if he pay any of the Teſtators Debts, or receive any Debts due to the Teſtator, and give Acquittances for the ſame, with other like acts; in ſuch Caſe he ſhall be ſaid to Adminiſter as Executor, and may be compelled to ſtand to the Executorſhip. *Hil. 8 Jac. C. B. in Wickenden and Thomas caſe. Brownlowes 2 part Rep. fol. 58. Bro. Ex. 49. Fitz. Exec. 38. Stokes and Porters ca. Mores Rep. fol. Noys Max. p. 102. Tr. 13 Eliz. C. B. Hawkins and Laws ca. Leon. Rep. fol. 155. Swin. part 6. ſect. 22. Porters caſe. Dyer, fol. 166.*

306. If a Stranger who is neither Executor nor Adminiſtrator enter upon the Goods, as aforeſaid; this ſhall charge him as Executor of his

own wrong, and he may be ſued by the Creditors of the perſon deceaſed: but after the Will is proved, or Adminiſtration granted, and they have intermeddled with the Goods, then the Stranger cannot be ſued, becauſe there is another Executor of right, againſt whom the Creditor may bring his Action, and is chargeable as far as thoſe Goods will extend which are come to his hands after he hath aſſumed upon him the charge of the Executorſhip: but notwithſtanding all this, that there be an Executor which doth Adminiſter, yet if the Stranger will ſtill take the Goods, and claim to be Executor, and pay Debts or Legacies, or receive Debts; in ſuch caſe it is ſaid he may be charged as Executor in his own wrong, although there be another Executor of right: *Quia os ſuum contra ſe aperuit; nam expreſſa nocent, quæ tacita non nocent.* 2 *Jac.* *C. B. Reads caſe. Co.* 5 *li. fol.* 33, 34. *Swin. part* 6. *ſect.* 22. *M.* 3 *Car.* 1 *Whitmor*

Whitmore and Porters caſe. Cro. 1 *part Rep. fol. Vide Ir.* 12 *Jac. C. B. Rott.* 4087. *Keeble and Osbaſtons caſe. Hobarts Rep. fol.* 49. *And Chandler and Thompſons caſe*, 262. *Bro.* 2 *part Rep. fol.* 185.

307. Note, that an Executor of his own wrong is chargeable no further then the value of the Goods which come to his hands, and with which he hath intermedled. *Brownlowes* 2 *part Rep. fol.* 185. *Mich.* 23 *Car.* 1. *B. R. Styles Repracticale, pag.* 120.

308. If a man do onely perform deeds of Charity, as to feed the Cattle of the deceaſed, leſt they ſhould periſh, or take into his cuſtody the Goods leſt they ſhould be ſtoln, or diſpoſe of the Goods about the Funeral of the Teſtator; theſe acts do not charge a man as Executor of his own wrong. *Franc. Mantica de conject. ult. Volunt. li.* 12. *tit.* 9. *num.* 18. *Fitz. Exec. num.* 38, 45. *Bro. Admin. num.* 6, 28. *Swin. part* 6. *ſect.* 22. *Brownlowes Rep.* 2 *part fol.* 184. *Hil.* 1

*El. C. B. Dyer, fol.*166. *Noyes Max. pag.*102.

309. Where ſervants after the death of their Lords or Maſters do imbezil their Goods, after full inſortion thereof made to the Lord Chancellor by the Executors, or two of them, of ſuch ſpoil made, the ſaid Lord Chancellor by advice of the two Chief Juſtices and Chief Baron, or two of them, ſhall have power to make ſuch Writs to be directed to ſuch Sheriffs as to them ſhall ſeem fit, to make Proclamation in ſuch places within twelve days after the delivery of the ſaid Writs, as to the ſaid Chancellor by advice aforeſaid ſhall ſeem reaſonable, that the Offenders appear in the Kings Bench at the day limitted in the Writ; which Proclamation ſhall be made fifteen days before the day of appearance, when if the Offender appear not, he ſhall be attainted of Felony; and if he appear, the Juſtices ſhall commit him to priſon, there to remain until he have

have anſwered the Executors in their Actions, and the ſame Actions be determined; provided that they be purſued with effect, and not ſlackly: but if the Offenders procure two ſufficient men to be bound with them in Recognizance to the Executors in the ſame Court where they ſtand committed, to keep ſuch day as they ſhall have by the Court, then the Juſtices there may bail them; and if the Goaler let them go at liberty without the Juſtices Order, he forfeits forty pounds. *Stat.* 33 *H.*6. *cap.*1. *Wingates Abr. Stat. tit. Executors.*

310. If any perſon ſhall obtain any Goods or Debts of an Inteſtate, or Releaſes or other diſcharge of any Debt or Duty, (which belonged to the Inteſtate) by fraud, (as by procuring the Adminiſtration to be granted to a Stranger of mean Eſtate, and not to be found, with intent thereby to obtain the Inteſtates Eſtate) and not upon valuable conſideration, or in ſatisfaction of ſome

juſt Debt, anſwerable to the value of the Goods ſo obtained; in ſuch Caſe ſuch perſon ſhall be chargeable as Executor of his own wrong, ſo far as the value of the Goods or Debts ſo obtained ſhall amount unto: howbeit, he ſhall alſo be allowed ſuch reaſonable deductions, as other Executors or Adminiſtrators ought to have. 42 *El. cap.* 8. *Winga. Abr. Stat. tit. Executors.*

311. Note, that the time wherein he that is named Executor in the Teſtament is to deliberate and determine whether he will accept or refuſe the Executorſhip, is left to the diſcretion of the Ordinary, who not only within the year (allowed by the Civil Law) but within a Moneth or two may cite him to accept or refuſe the Office. *Swin. part* 6. *ſect.* 4. *Refor. Legum Eccleſ. tit. de Teſtamentis, cap.* 34 *pag.* 143.

CHAP

CHAP. X.

Of making of an Inventary, proving of the Will, with the Fees thereof, and before whom it ought to be proved; and of paſſing an Account, and paying of Mortuaries.

312. WHen an Executor intends to accept of the Office, it behooves him to make an Inventary of the Teſtators Goods; for if he meddle with the Goods, and refuſe to make an Inventary, he may be puniſhed by the Ordinary; but he may meddle with the Goods as to the diſcharging of Funerals, or diſpoſing of ſuch things as cannot be preſerved and kept till the time of making the Inventary. *Swin. part 6. ſect. 6 and 8. 21 H. 8. cap. 5.*

313. And as for the time of making the Inventary, it is left to the

diſcretion of the Ordinary, who may appoint a longer or ſhorter time, according as the diſtance of the place where the Goods remain, or other circumſtances ſhall miniſter occaſion. *Lyndwood in C. Stat. verb. Arbitrio. Swin. part 6. ſect. 8. num. 1.*

314. And as for the form thereof, it ought to be made by two at the leaſt, to whom the Inteſtate was indebted, or left any Legacie; and upon their refuſal or abſence, two or more other honeſt men may by the Executors appointment make the Inventary of all the Goods and Chattels, Rights, Wares and Merchandiſes as well moveable as not moveable whatſoever, that were of the perſon deceaſed; and the ſame muſt be Indented, whereof one part is to remain with the Executor, and the other with the Ordinary, where the Executor muſt ſwear that the ſame is true: and the uſual courſe in making of ſuch Inventaries, is firſt to ſet down moveable Goods, beginning with

with his Purſe and Apparel; then Houſhold-ſtuff as it ſtands in every Room, beginning in the Hall, and ſo from Room to Room in order throughout the Houſe; then Corn in the Barnes or Garners, or ready ſown in the Fields; then Cattle, Husband-geer, as Ploughs, Carts, *&c.* then in moveable Goods, as Leaſes of Lands or Tenements; and after that, the Debts due to the Teſtator; and oftentimes, at the lower end of all, the Debts owing by the Teſtator to other perſons. 21 *H.* 8. *C.* 5. *Franc. Porcel. Trac. de Inve. Swin part* 6. *ſect.* 9. *Refor. Legum Eccleſ. C. de Teſtamentis, ſect.* 20.

315. Note, that the Goods in the Inventary ought to be particularly prized and valued according to reaſonable prizes, and not hudled up together ſeveral things in a groſs ſum: but thoſe Goods which do belong to the Heir after the Teſtators death, muſt not be put into the Inventary; neither may thoſe Goods called *Bona Pera-*

Peraphernalia, (which is the Wives convenient Apparel agreeable to her Quality) be put into the Inventary: nay, ſuch is the general cuſtom within the Province of *York*, that Widows are there not onely tolerated to reſerve to their own uſe their convenient Apparel, and a convenient Bed and Furniture; but alſo a Coffer or Box with divers things therein, as Jewels, Chains, Borders, and other things neceſſary for their own perſons. *Swin. part 6. ſect. 9. num. 5. Johannes Garſi. Tract. de expenſis, fol. 182. Perkins, ſect. 526. Noyes Max. pag. 107. Swin. part 6. ſect. 7.*

316. Certain Jewels to the value of 500 Marks, were allowed to a Viſcounteſs, as her *Peraphernalia*, and accounted but a reaſonable allowance for one of her degree. *Viſcounteſs Bindons caſe. Abr. Mores Rep. pag. 72. pl. 338.*

317. But note, if the reſt of the Goods will not ſuffice to pay the Husbands Debts then are the Wives Jewels,

Jewels, Chains, Borders, and ſuch-like, (being things of Decency or Ornament, and not of Neceſſity) to be put into the Inventary amongſt other Goods of the deceaſed, towards the payment of his Debts. *Swin. part 6. ſect. 7. num. 5. in fin.*

318. Note alſo, that the Husband may Deviſe ſuch Chains and Jewels, *&c.* though he leave ſufficient Aſſets beſides to pay his Debts; and in ſuch caſe the Wife ſhall not have them as her *Paraphernalia:* but if the Huſband make no Gift or Deviſe of them, and leave Aſſets beſides to pay his Debts; then the Wife in ſuch caſe may keep them in deſpite of the Executors or Adminiſtrators. *Tr. 8 Car. 1. B. R. Lord Haſtings and Sir Archibald Douglas ca. Cro. 1 part Rep. fol. 251, 252, 253. And See Davenports ca. 5 Car. 1. in Chancery. Compl. Attor. pag. 305.*

319. If any Creditor or Legatary do affirm that more Goods came to the Executors hands, then are named

in

in the Inventary, he muſt prove it; for otherwiſe Credit is to be given to the Inventary. *Maſchard. de probac. Concluſio* 939. *Swin. part* 6. *ſect.* 10. *Reforma. Legum Eccleſiaſt. tit. de Teſtamentis, cap.* 21.

320. If there be ſeveral Executors, and one of them exhibits an Inventary; this ſhall not charge the other in an Action brought againſt them; but the party that ſues muſt prove that ſuch Executor hath actually Adminiſtred, and that Goods came to his hands, or elſe he ſhall not be charged. *Lent-Aſſizes apud Ebor.* 8 *Car.* 1. *Irelands caſe. Claytons Rep. pag.* 106. *pl.*179.

321. After an Inventary made as afore declared, then the Executor is to prove the Teſtament before the Ordinary, or other Judge to whom the Probat thereof belongs; and if the ſame be not in the Executors poſſeſſion, but in ſome others hand, then he may cite ſuch perſon before the Ordinary, and force him to exhibit the

the ſame. *Perkins, ſect.* 486. *Swin. part* 6. *ſect.* 12.

322. Note, that all Teſtaments ought to be proved before the Ordinary, except in ſpiritual places, where the Lords have the Probat of their Tenants Teſtaments before their Stewards or themſelves, in their Temporal Courts. *Perkins, ſect.* 486.

323. If a Lord would have the Probat of a Teſtament made within the precinct of his Mannor, he cannot prove a Teſtament made without the ſaid precinct. 2 *R.* 2. *Teſtament.* 4. 11 *H.* 7. *fol.* 12. *Co.* 2 *part Inſt. fol.* 231.

324. A Teſtament proved before the Commiſſary of the Biſhop, or before any Officer of the Ordinary deputed to the ſame, is ſufficient; or if it be before the Sequeſtrators of the Arch-Deacon of ſuch a place, and his Seal put thereunto, it is ſufficient: for all Teſtaments cannot be proved before the Ordinary himſelf; and properly the Probat of the Will

doth

doth belong unto him to whom the Sequeſtration doth belong. 3 *E.* 3. *Teſtamen.* 5. 1 *Hen.* 6. 1. 11 *H.* 4. 64. *Perkins Sect.* 490, 491. *Tr.* 7 *E.* 4. *fol.* 14. *a.*

325. A Teſtament after it is proved, is of ſo great force, that a man ſhall have no direct Traverſe againſt it, becauſe it being to be tryed by the Certificate of the Ordinary, it is ſuppoſed that he will not certifie contrary to that which is ſhewed unto the Court under his Seal: but if a man be ſued by an Executor after Probat, though he can have no Traverſe to the Teſtament, yet he may ſay that the Teſtator made not the Plaintiff Executor. 18 *E.* 2. *Teſtamen.* 6. *Perkins, ſect.* 493.

326. Note, that the proving of the Teſtament is done two manner of wayes; either by common form, or form of Law: the common form is, when the Executor after the Teſtators death preſents the Teſtament to the Judge, and produceth Witneſſes to

to prove the ſame *viva voce*, without citing or calling of ſuch as have intereſt therein; and thereupon the Judge doth annex his Seal to the Teſtament. 21 *H.*8.*C.*5. *de Caſtr.Conſil.* 99. *vol.*1. *Swin.part* 6.*ſect.*14.

327. When it is proved in form of Law, then the Widow or next of Kin to the deceaſed, to whom Adminiſtration ſhould belong if the party had dyed Inteſtate, are cited to be preſent, and the Will is exhibited, and the Witneſſes examined privately every one of them, as well to the Articles exhibited on the Executors part, as to the Interrogatories Adminiſtred on the Widow or other adverſe parties behalf; and ſo according to the ſufficiency of the proof, the Judge doth pronounce either for the validity of the Teſtament, or againſt it, according to his diſcretion. *Paul. de Caſtr. Con.*96. *vol.*1. *Swin. part* 6. *ſect.*14.*num.*3.

328. When a Teſtament is proved after the common form, the parties in-

intereſted may force the Executor to prove it over again in due form of Law, which may indanger the Teſtament if the Witneſſes be dead in the mean time; unleſs it be after ten years ſpace, for then it ſhall be preſumed, that neceſſary ſolemnities have been obſerved: but on the contrary, if it be once proved in form of Law, the Executor is not compellable to prove the ſame any more. *Socin. Jun. Conſil.* 89. *vol.* 1. *Swin. part* 6. *ſect.* 14. *Paul. de Caſt. Conſil.* 96. *vol.* 1. *And Simo de Prætiſ. Interp. ult. Volunt. li* 2. *Dub.* 2. *Soluc.* 3. *ſect.* 207. *num.* 4 *and* 5.

329. Note, when any one intends to plead any thing againſt the validity of a Teſtament, they ought to do it at the time of the proving it, or within a year after, unleſs they were at ſuch time Infants, or in Travel beyond the Seas, ſo as they could hear nothing of it; and then they ſhall have ſix months after their return from Travel to plead againſt it, and the

the Minors a year after they come to full age: and if ſuch parties exceed their limitted times, then they are excluded from any remedy, unleſs it be in caſe where the Teſtament was not at firſt proved in form of Law, but after the common form; for then they may cauſe the Teſtament to be proved over again at any time within ten years, and alledge what they can againſt it. *Refor. Leg. Eccleſ. tit. de Teſtamentis, cap.* 6.

330. If any ſhall exhibit a falſe Teſtament, or any ways pervert a true Teſtament, by adding, diminiſhing, changing, or interlining the ſame, and is openly convinced of ſuch crime; they ſhall thereby be excluded from all benefit accrewing to them by ſuch Teſtament. *Refor. Leguw Eccleſ. tit. de Teſtamentis, cap.* 39.

331. If an Executor or Adminiſtrator be ancient, ſickly, or live far diſtant from the Court where he ſhould have the Probat of the Will,

or Letters of Adminiſtration; then he may in ſuch caſe have a Commiſſion directed to two Neighbour-Miniſters to take his Oath, and upon return thereof have the Probat under Seal.

332. As touching the Fees taken for Probat of Wills, *&c.* they vary according to the cuſtom of ſeveral places; but where the Inventary exceeds forty pounds, the uſual Fees are between five Nobles and forty ſhillings, if it be by Commiſſion; and if it be not by Commiſſion, but that the Executor go himſelf to the Ordinary, or other Eccleſiaſtical Judge, who hath the granting of the ſame; then it will not coſt ſo much by 13*s.* 4*d.* or thereabouts.

333. But if theſe Officers could be brought to walk by the Rules of the Statute, the Fees would be far leſs; for by the Stat. of the 21 *H.*8. *cap.*5. it is enacted, That if the goods of the Teſtator do not exceed five pounds, that then there is onely due to the Scribe

Scribe for writing the Probat of the Teſtament, ſix pence, but nothing to the Ordinary or his Official, *&c.* for the Probat thereof and putting to his Seal: but then the Teſtament muſt be exhibited to him in writing, with wax thereunto affixed ready to be ſealed and proved *Communi forma*; and in ſuch caſe he is to diſpatch the party without delay: and no more is due then ſix pence for granting Adminiſtration, where the Inteſtates goods do not exceed five pounds, as aboveſaid. *Wingates Abr. Stat. tit. Prob. of Teſtam. num.* 2. 21 *H.*8. *C.* 5. *Swin. part* 6. *ſect.* 15.

334. When the goods of the deceaſed exceeds five pounds, and are under forty pounds; then there is due to the Ordinary for the Probat two ſhillings and ſix pence, and to the Scribe for Regiſtring the ſame one ſhilling; and where the goods exceed forty pounds, then there is due to the Ordinary for the Probat two ſhillings and ſix pence, as aboveſaid;

and two ſhillings and ſix pence to the Scribe for Regiſtring of the ſame; or the Regiſter may refuſe two ſhillings and ſix pence, and take a penny for every ten lines of the Teſtament, each line being to contain ten Inches in the length: but note, that in all theſe caſes the Will muſt be brought to the Ordinary ready Ingroſſed with wax at the ſame, if you intend to tye him to the Fees aboveſaid. *Swin. part 6. ſect.* 15. *Refor. Legum Ecc. tit. de Teſt. C.*17. *Wingates Abr. Stat. tit. Prob. of Teſtaments, num.*3. 21 *H.*8. *cap.*5.

335. The Fees either for the copy of the Will or Inventary, are the ſame as are allowed for Regiſtring the Will; or the Regiſter may refuſe the ſame, and take a penny for every ten lines for the length as aforeſaid. The Officer that takes more then his juſt Fee, ſhall forfeit that exceſs to the party grieved, and ten pounds beſides, to be divided betwixt the King and the party that will

will ſue for the ſame in any of the Kings Courts.

336. Where by cuſtom leſs hath been taken in any of the caſes aforeſaid, there leſs is to be taken ſtill, notwithſtanding the Act of the 21 *H.*8. *Wingates Abr. Stat. tit. Probat of Teſt. num.*11. *Swin. part* 6. *ſect.* 15. *num.*4. 21 *H.*8. *cap.*5.

337. If a Teſtament be in Paper, and the Executor deſires that the ſame ſhall be tranſcribed and ingroſſed in Parchment; then he muſt agree with the Clerk for tranſcribing the ſame as cheap as he can; and when both are brought to the Ordinary, it is in his choice whether he will put his Seal and Probat to the Original or Tranſcript: but there is nothing due to the Ordinary for the Tranſcript, nor for examining the ſame with the Original; but onely for affixing his Seal and Probat, he ſhall take ſuch Fees as is afore declared. *Co.* 3 *part Inſt. fol.*149, 150. *chap. Extortion.*

338. And If any Ordinary or his

Official, *&c.* exact greater Fees then theſe above mentioned, it is Extortion, and ſo it was adjudged by the whole Court of Common Bench, *Mich.* 6 *Jac.* upon an information againſt one *Rowſe* Commiſſary of the Arch-Deacon of *Huntington*, at the ſuit of one *Neal*, which was for taking a Fee for ingroſſing the Probat upon the Tranſcript of the Teſtament, over and above his lawful Fee due by the 21 *H.*8. above mentioned: and if this preſident were put into practice, the Probat of Teſtaments and granting Adminiſtrations would not be ſo chargeable as in moſt places at this day they are. *Mich.* 6 *Jac. C. B. Rott.* 1301. *Neal and Rowſe caſe. Co.* 4. *part Inſt. fol.* 336.

339. When a Will where Lands are deviſed comes to be proved in the Prerogative-Court, they ought onely to take a Copy thereof into their Leiger-Book, and deliver the Original to the Legatee of the Lands to ſupport his Title by, if he be queſtioned

queſtioned for the ſame. *Mich.* 1649. *B. R. Styles Regeſt. Practicale, pag.* 358.

340. If a man be long abſent, and it be not known whether he be alive or dead; if he have made a Will, it may be proved; eſpecially if it be reported that he is dead, and that the party abſent were ſickly, and a very old man when he went away, or the like. *Miſchard. de Probac. Concluſio* 1074. *num.* 4. *Swin. part* 6. *ſect.* 13.

341. Note, that if the party dying have at the time of his death goods or good debts in any other Dioceſs or Dioceſſes, or peculiar juriſdiction within that Province, beſides thoſe goods in the place where he dyes, amounting to the value of five pounds at the leaſt; then the Probat of ſuch Will, or granting Adminiſtration, belongs to the Arch-Biſhop or Metropolitan of that Province, whether it be within the Province of *Canterbury* or *York*; this does not

prejudice thoſe Dioceſſes where by compoſition or cuſtom *Bona Notabilia* are rated at a greater ſum. *Book of Canons, pub.* 1 *Jac. Anno Domini* 1603. *Can.* 92 *and* 93. *Perkins, ſect.* 489.

342. And if the Executor or Adminiſtrator cited or appearing voluntarily before the Judge (appointed for Probat of Wills, *&c.* within ſuch Dioceſs or peculiar Juriſdiction where the party dyed) do upon his Oath affirm that the party deceaſed had goods or good debts to the value of five pounds aforeſaid, in any other Dioceſs or Dioceſſes, or peculiar Juriſdiction within the ſaid Province; then is the Judge to diſmiſs him, and admoniſh him to prove the ſaid Will, or require Adminiſtration of the goods in the Prerogative Court of the Arch-Biſhop of the Province, and afterwards to exhibit the Probat or Adminiſtration under Seal of the ſaid Prerogative-Court before him the ſaid Judge with-

within forty days then next following: and the ſaid Judge ſo diſmiſſing the party as aforeſaid, ſhall not exact or take any charges of the ſaid parties, more then ſuch onely as are due for the Citation, and other Proceſs had and uſed againſt ſuch perſons upon their contumacy: and if any Judge or their Regiſter ſhall offend herein, he is to be ſuſpended from his Office *ipſo facto*, and not to be abſolved till he have paid to the party all his expences laid out contrary to the Tenor of the premiſes. *Book Can.* 1 *Jac. An. Dom.* 1603. *Can.* 92 *and* 93. *Swin. part* 6. *ſect.* 11.

343. Note, that the probat of every Biſhops Teſtament, or granting Adminiſtration of his Goods (although he have no Goods but within his own Juriſdiction where he was Biſhop) doth belong to the Arch-Biſhop within whoſe Province the party deceaſed was Biſhop. *Co.* 4 *part. Inſt. fol.* 335.

344. If any Ordinary of a Dioceſs, or

or Commissary of a peculiar Jurisdiction commit Administration of his Goods that hath *Bona Notabilia* as aforesaid in divers Dioceſſes, it is utterly void to all intents and purposes, aſwell concerning Goods in his own Dioceſs as elſewhere. But if the Metropolitane do commit Administration, ſuppoſing the party deceaſed to have *Bona Notabilia*, whereas he hath but Goods only in one inferior Dioceſs; this Administration is not voyd, but only voydable by Sentence, for that the Metropolitane hath Juriſdiction over all the Dioceſſes within his Province. 22 *El. B. K. Veer and Jefferyes Ca. vouched in Co. 5 li fo. 30. in Princes caſe, and Mores Rep. the ſame caſe.*

345. Note, that in former times (when Popery and Idolatry reigned in this Kingdom) every Executor or Adminiſtrator was to paſs his Account to the Ordinary, how he had performed his Office; and if any thing remained in the Executors hands after the payment of the Teſtators Debts,

Debts, then the Ordinary uſed to appoint the payment of ſuch Reſidue to Pious uſes: but this is now of little uſe; for at this day the Ordinary cannot compel the Executor to make ſuch diſtribution; for if any thing remain, the Executor or Adminiſtrator may keep the ſame, and convert it to their own uſe. *Swin. part 6. ſect. 20. num. 2.*

246. Upon the paſſing an Account aforeſaid it was uſual to call the Creditors to whom the Teſtator was indebted, and alſo the Legataries, and all others having intereſt, before the Ordinary to whom the Probation appertained; and they were to hear the Account: and if it appeared to the Ordinary that the Executor had faithfully executed his Office, and fully Adminiſtred; then he might acquit the Executor, and give Letters of diſcharge from being any further troubled, at leaſt in the Eccleſiaſtical Court: but if the Account were made in the Creditors abſence, and they ne-

never called, such Account doth not prejudice them. *Swin. part 6. sect.* 20. *Lindwood in C. Statut. sect. Et postquam verb. Ordinariis.*

347. And if any inferior Judge under the degree of a Bishop, should grant unto any Executor Letters of Acquittance or final Discharge before a Lawful Account made, that Judge is *ipso facto* suspended *ab ingressu Ecclesiæ* by the space of six Moneths, and the Executor doth receive no benefit by such acquittance. *Lindwood in D. C. in fin. verb. Acquietantiarum. Swin. part. 6. sect. 21. num. 3.*

348. As touching Mortuaries, it is enacted by Authority of Parliament, That no Parson, Vicar, Curate, Parish-Priest, nor any other Spiritual Parson, nor their Farmers or Leassees, shall demand any Mortuary for any person dying, but in such places only where Mortuaries have been used to be payd and given in those places, according to the rates hereafter mentioned; and that no person pay in more

more places then one, and that is in the place of their moſt dwelling or habitation. 21 *H.* 8. *C.* 6. *Swin. part* 6. *ſect.* 16. *Wingate Abr. Stat. Tit. Mortuaries.*

349. If a Perſon at the time of his Death be not worth in Moveable Goods to the value of ten Marks, no Mortuary is then due; if he be worth ten Marks or more, clearly above his Debts payd, and under thirty pounds or above, and under fourty pounds, then a Noble is due; and if he be worth forty pounds or above, to any ſum whatſoever, then ten ſhillings is due: and if any of the Perſons before named take more then is here ſet down, they forfeit forty ſhillings, and ſo much more as they took more then their due: and in ſuch places where leſs hath been accuſtomed to be paid, no perſon ſhall be compelled to pay more then according to the cuſtome in ſuch place. *Wingates Abr. Statut. Tit. Mortuaries.* 21 *H.* 8. *C.* 6. *Swin. part* 6. *ſect.* 16.

350. Note,

350. Note, that no Mortuary is to be payd for a Woman being Covert-Baron, nor for a Child, nor for any perſon not keeping houſe; and if a way-faring man dye, his Mortuary is to be payd in ſuch a place where he had the moſt habitation, if Mortuaries be accuſtomed to be paid in ſuch place. *Wingates Abr. Stat. Mortuaries.* 21 *H.* 8. *C.* 6. *Swin. part* 6. *ſect.* 16.

351. The Biſhops of *Bangor*, *Landaff*, *St. Davids*, and *St. Aſaph*, and the Arch-Deacon of *Cheſter*, may take ſuch Mortuaries of their Prieſts within their Dioceſſes and Juriſdiction as heretofore hath been accuſtomed. 21 *H.* 8. *C.* 6. *Swin. part* 6. *ſect.* 16. *Wingates Abr. Stat. Tit. Mortuaries.*

352. Where Mortuaries are due, they are to be payd out of the death part only, and not out of the whole before Diviſion, where the Widdow and Children are to have their reaſonable parts; and ſuch Mortuary is

o be payd before any other Legacy whatſoever. *Hoſtienſ. in C. conquerente de Offic. Ordin. verb. Mortuar. Swin. part 6. ſect. 16. in fin.*

CHAP. XI.

Of the Power of the Ordinary in granting Adminiſtrations, and ſome few Caſes touching Appeals, and alſo of the Office of an Adminiſtrator, and how far the Ordinary is chargeable for the Inteſtates Debts.

353. *Ordinary* in the uſual and common ſence ſignifieth a Biſhop, and is derived *ab ordine*; but generally by the Law *Ordinarius* is not only taken for a Biſhop, but every one that is *in loco Epiſcopi*, as Guardians of the Spiritualities, and ſuch as have peculiar and exempt juriſdiction Eccleſiaſtical, and be immediate

mediate Officers to the Kings Courts of Justice. *Co. on Litt. fol.* 344. 18 *El. Dyer, fol.* 350. *Regist. fol.* 67. *Co.* 2 *part Inst. fol* 398.

354. If a Caveat be entered with the Bishop, that he should not admit any without giving notice; yet notwithstanding he may admit one to the Administration: but if it be one who hath no right that is admitted, he is then a disturber; otherwise the Caveat doth nothing but onely to make the Bishop careful what person he admits. *Brownlowes Rep.* 2 *part fol.* 119.

355. The Ordinary is to commit Administration of the goods of one dying Intestate to the Widow, or to the next of his blood, if they will accept it, or to both: and where divers are next of blood, and in equality of degree, and do claim Administration; in such case he may grant it to which of them he pleaseth: or, where one claimeth as next of blood to the Intestate, where in truth divers

are

are in equality of Kindred; here the Ordinary ſhall be at his choice to accept one or more making Requeſt: and where but one or more, and not all are in equality of Kindred, and do make Requeſt, the Ordinary is at liberty to admit the Widow, and him or thoſe onely making Requeſt, or any one of them, at his pleaſure: and if the Ordinary do not obſerve theſe Rules, he forfeits ten pounds, by the 21 *H.*8. *c.*5. 21 *H.*8. *c.*5. *Fynch li.*2. *c.*15. *pag.* 174, 175. *Noyes Max. pag.* 105. *Styles Regeſt. practicale, pag.*22. *Mich.* 24 *Car.* 1. *B. R. Reformat. Legum Eccleſiaſt. tit. de Teſtamentis, c.*42.

356. One of the half-blood is in as equal degree of Kindred, to have the Letters of Adminiſtration committed to him, as one of the whole blood is. *Mich* 23 *Car.* 1. *B.R. Styles Rep. fol.* 74, 75. *and Paſch.* 24. *c.* 1. *B. R. Hill and Brides caſe. Styles fol.* 102.

357. If the Ordinary take any

Reward or Fee for preferring of any one person before another to the Administration, it is Bribery, and punishable with Fine and Imprisonment at the Kings pleasure, and frequently loss of their place. *Co. 3 part Inst. fol. 148. cap. Bribery in fine.*

358. When the Widow or next of Kin are cited and refuse the Administration, then the Ordinary may grant it to some of the Creditors, or to some other such as he thinks fit. *Hernes Law of Conveyances, pag. 86.*

359. VVhere divers are made Administrators, they have but one joynt Interest, and therefore one of them cannot discharge a Debt by himself in prejudice of the others, as one Executor may do, as is shewed before in the ninth Chapter; but in such case all the Administrators must joyn. *Herns Law Convey. pag. 88.*

360. If Administration be unduly granted to such a person as ought not to have the same; in such case the Ordinary may revoke the same afterwards:

terwards: but if it be duly granted to thoſe who of right ought to have the ſame, then he cannot lawfully revoke it; and if there be a ſuit depending to that purpoſe in the Spiritual Court, a Prohibition will be granted. *Clerks ca. M.* 20 *Jac. B. R. Rott.* 2196. *Vide Cro.* 1 *part, Fotherbies ca. and Paſc.* 21 *Car.* 1. *B. R. Betteſworth and Betteſworths caſe. Styles Rep. fol.* 10.

361. If Adminiſtration be unduly granted by the Ordinary of an inferiour Dioceſs, the party grieved cannot have a Prohibition at the Common Law, but he muſt appeal to the Metropolitan or Arch-biſhop of the Province, from thence to the Court of Delegates; for the Stat. of 21 *H.* 8. doth not ſay that the Adminiſtration ſhall be committed to the next of blood, or elſe the Adminiſtration to be void; but that it ſhall be granted on ſuch a pain: and ſo it doth not take away the Cognizance of the Caſe from the Eccleſiaſtical

Judge. *P.* 1 *Car.* 1. *B. R. Mayowes ca. Latches Rep. fo.* 67. *M.* 24 *Car.* 1. *B.R. Browne and Poynes caſe. Styles Rep. fol.* 147.

362. If one dye Inteſtate, and the Ordinary grants Adminiſtration to a Stranger, and the next of Kin ſues a Citation out of the Spiritual Court to have the Adminiſtration revoked, and pending the Suit the Adminiſtrator ſells the goods to defeat the next of Kin, and then the Letters of Adminiſtration granted to the Stranger are revoked and made Null by Sentence; yet in this caſe the ſale by the firſt Adminiſtrator is good: but if the next of Kin had appealed to have the Adminiſtration revoked, and pending the appeal the firſt Adminiſtrator ſels his goods; then in ſuch caſe the ſale is void: and ſo note the difference between a Suit by Citation to revoke a former Adminiſtration, and an appeal; for an appeal doth ſuſpend the former Sentence. 37 *El. B. R. Packmans caſe. Co.* 6 *ii. fol.*

*fol.*28. *Vide Harlings caſe. Claytons Rep.*25.

363. VVhere an appeal is made, and the firſt Adminiſtration is confirmed, then the uſe is to ſend back the Cauſe to the Court from whence it came by appeal: but when the firſt ſentence is reverſed, then the firſt Court is outed of its juriſdiction, and the Court which reverſes it ſhall commit the Adminiſtration *de novo. P.*1 *Car.*1. *B. R. Reeve and Dennyes ca. Latch.*85.

364. Appeals in Caſes Teſtamentry, Matrimony and Tythes, muſt be ſued from the Arch-Deacon or Official (if the matter be there commenced) to the Biſhop of the Dioceſs; and from the Biſhop Dioceſan, or his Commiſſary in ſuch Caſe, (or when the matter is there commenced) within fifteen days after ſentence given, to the Arch-biſhop of the Province and no farther, but there to be definitively adjudged. See num. 368. 24 *H.* 8 *c.*12. *Wing. Abr. Stat.*

tit. Appeals to Rome, num. 5. *Co.* 4 *part Inſt. fol.* 339.

365. VVhen the Cauſe is commenced before the Arch-deacon, or Commiſſary of the Arch-biſhop, the appeal may be made (within fifteen days after ſentence given) to the Court of Audience of the ſaid Arch-biſhop; and from thence within fifteen days after ſentence, there to the Arch-biſhop himſelf, and no further: when the Cauſe is commenced before the Arch-biſhop himſelf, it was to be determined there without further appeal, by the Stat. 24 *H.* 8. *c.* 12. 24 *H.*8. *c.* 12. *Wing. Abr. Stat. tit. Appeals to Rome num.* 6 *and* 7. *Co.* 4. *part Inſt. fol.*339.

366. But ſee the Stat. 25 *H.* 8. where it is added further, that appeals ſhall be from the Arch-biſhops Courts to the King in his Chancery, where a Commiſſion ſhall be awarded under the Great Seal to certain perſons to be named by the King, for the determination of the ſaid appeals,

peals, and from thence no further; and theſe Commiſſioners are called Delegates, becauſe they are delegated by the Kings Commiſſion. *Co.4. part Inſt. fol.* 339, 340. 25 *H.* 8. *c.* 19. *Wingates Abr. Stat. tit. Appeals to Rome, num.*4.

367. When the Cauſe or Suit concerns the King, the party grieved may (within 15 days after ſentence given) appeal from any of the ſaid Courts Eccleſiaſtical to the higher Convocation-houſe of that Province, and no further; and there to be finally determined. 24 *H.* 8 *c.*12. *Co.* 4 *part Inſt. fol.* 323 *and* 339. *in fine.*

368. Appeals from places exempt which were before to the See of *Rome*, ſhall be into the Chancery *ut ſupra*, and not to the Arch-biſhop; and ſhall be determined by the Delegates. 25 *H.*8.*c.* 19. *Co.* 4 *part Inſt. fol.*340.

369. But note, that where it is ſaid in the caſe aforeſaid, upon the Stat.

of the 24 *and* 25 *H.* 8. that the ſentence ſhall be definitive upon certain appeals there mentioned; yet notwithſtanding, the King as Supream Head, upon complaint to him made, may grant a Commiſſion of Review; for ſo the Pope uſed to do as Supream Head; and the ſame power which the Pope had formerly, doth now of right belong to the Crown, and is annexed thereunto by the 26 *H.* 8. *c.* 1. *and* 1 *Eliz. c.* 1. And ſo it was reſolved, *Tr.* 39 *El. B. R.* where the caſe was, that ſentence being in an Eccleſiaſtical cauſe in the Country, the party grieved appealed to the Arch-Biſhop where the firſt ſentence was affirmed; from thence he appealed to the Delegates, before whom both the former ſentences were repealed, and made void by definitive ſentence: and thereupon the Queen as Supream Head granted a Commiſſion of Review *ad Revidendum* the ſentence of the Delegates. *Co.* 4 *part Inſt. fol.* 341. *Tr.* 39 *tit. B. R.*

Hol-

Hollingworths caſe. Raſtal Rome 389.

370. If the Ordinary knowing that there is a Teſtament and an Executor named therein, will notwithſtanding grant Adminiſtration of the deceaſeds Goods, not having firſt called the Executor before him to prove the Will, or to accept or refuſe the Executorſhip; then in ſuch caſe, when the Excutor ſhall prove the Will, he may ſue the Adminiſtrator in an Action of Treſpaſs, notwithſtanding the Adminiſtration granted by the Ordinary. *Swin. part 6. ſect.* 2.

371. If a man be Executor to one who was Adminiſtrator to another man, in this caſe he ſhall not have adminiſtration of ſuch Goods as his Teſtator had by vertue of the Adminiſtration; but the Adminiſtration thereof ſhall be committed to the next of Kin to him that dyed firſt. *Vide H.* 43 *El. C.B. Thorns caſe. Goldeſ. Rep. pag.* 182. *pl.* 118. *Hernes Law Convey.*

Convey. pag. 88. *Fitz. Abr. Tit. Admin. num.* 3. *Swin. part.* 6. *ſect.* 3. *num.* 12.

372. If an Executor in an Action brought by him recovereth, and afterwards dyeth Inteſtate, and then Adminiſtration of the Goods of the firſt Teſtator is committed to *J. S.* in this caſe *J. S.* before the *Stat.* of the 17. *Car.* 2. could not ſue out Execution upon ſuch Recovery, but was to begin a new; becauſe he comes in paramount to the Executor, and claims immediately from the firſt Teſtator: but ſee now the late Act made at *Oxford* 17 *Car.* 2. for avoyding of unneceſſary ſuits and delays, it ſtands on continuance for five years, and from thence to the end of the next Seſſion of Parliament. *Co.* 5 *lib. fol.* 9. *in Brudenels ca. Cro.* 2 *part. Yare and Goughs ca.* 1 *Jac. B. R. and M.* 4. *Car.* 1. *B. R. Snape and Norgates ca. Cro.* 3 *part, and Mores Rep. Levet and Lewkners caſe: but ſee now the Statute at* Oxford 17 *Car.* 2.

for

for avoyding unneceſſary ſuits and delays.

373. If an Adminiſtrator during Minority of an Infant-Executor, recover in Debt, and the Executor comes to age before Execution taken out; in ſuch caſe he may ſue out a ſpecial *Scire facias* upon the Record, and ſo ſue out Execution in his own name. *Vide* 27 *H.* 8. *fol.* 7. *a. Brownlows Rep.* 2 *part pag.* 83, 84.

374. An Adminiſtrator is not lyable to an Action for a Debt upon a Contract of the Inteſtates. *Mich.* 30, 31 *El. B. R. Hughſons and Webbs ca. Cro.* 1 *part.*

375. But if the Adminiſtrator after the Inteſtates death promiſe to pay ſuch a Debt; if there be a conſideration to ground the Action on, it is binding. As thus: the Husband was indebted to another man upon a Contract for Beer, and dyed Inteſtate; the wife took adminiſtration, and afterwards aſſumed upon her ſelf to the Creditor, that if he would deliver her ſix Barrels

Barrels of Beer, ſhe would not only pay for them, but her Husbands Debt alſo; in this caſe it was adjudged that Judgment ſhould be entred *de bonis propriis* generally, for it is become a Charge by her own act; and by her promiſe as Adminiſtratrix, ſhe hath made it her own Debt. *Tr.* 37 *El. B. R. in Wheeler and Colliers caſe. Cro.* 1 *part. Rep.*

376. A Rent was granted to the Husband and Wife for their Lives; the Rent is behind, and the Husband dyes, and then another Rent becomes in arrear, and the Wife dyes Inteſtate; and the Adminiſtrator brought an account of debt for both Rents in arrear, as well in the Husbands life-time, as in the Wives, and adjudged the Action did well lye. *Mich.* 42, 43 *El. B. R. Temple and Temples caſe. Cro.* 1 *part Rep. fol.*

377. If Adminiſtration of the debtors goods be committed to the Creditor, it doth not extinguiſh the debt; but if the Creditor make the debtor

debtor his Executor, it is a Releaſe in Law of the debt: but if a VVoman-Executrix take the debtor to Husband, this is no releaſe of the debt; for if he dye, ſhe may ſue his Executors; for the debt was but ſuſpended during the Coverture. *M. 31 El. B. R. Croſman and Reads caſe. Leonards Rep. fol. 320. Co. 8 li. fol. 135. in Sir Jo. Needhams caſe, and Mich. 1652. B. R. Rott. 686. Aſhby and Childs caſe. Styles Rep. fol. 384.*

378. Where an Infant is made Executor, and Adminiſtration is committed *durante minori ætate*, and the Adminiſtrator hath goods in his hands to a great value, and the Infant at his full age releaſes to the Adminiſtrator all demands; this releaſe ſhall be charged as aſſets in the Infants hands, for ſo much as he releaſed to the Adminiſtrator. *Mich. 15 El. Owens Rep. fol. 3. and M. 37 El. C. B. Rittleyes caſe. Godbolts Rep. fol. 29. and 30.*

379. An Adminiſtrator may bring an

an Action of Treſpaſs or Trover and Converſion, for goods taken away before he obtained the Adminiſtration; for the Letters of Adminiſtration ſhall relate to the time of the Inteſtates death, and not to the time of granting them. *M.* 1652. *B. R. Lodge and Hebbs caſe. Styles Rep. fol.* 341. *M.* 3 *Car.* 1. *B. R. Hudſon and Hudſons caſe. Latches Rep.* 214. 36 *H.* 6, 7. *Fynches Law, li.* 1. *c.* 5.

380. An Adminiſtrator may retain Money in his own hands to ſatisfie his own Debt, in prejudice of other like Creditors of the Inteſtates, aſwel as an Executor may do. *M.* 11 *Jac. Bond and Greens caſe. Godbolts Rep. fol.* 216. *Tr.* 13 *Jac. Rot.* 1906. *C. B. Waynford and Wayners ca. Brownlows Rep.* 1 *part pag.* 80.

381. An Adminiſtration may be granted upon Condition; and if the Condition be not performed, it may be revoked or repealed: but then if the Adminiſtrator before the Condition broken give away the goods, or ſell them,

them, ſuch acts are good. *Co. 6 lib. fol.* 19.

382. Note, If the Teſtators words be indifferent to make an Executor, or univerſal Legatary; a Teſtament, or a Codicil; in ſuch caſe it is uſual to commit the Adminiſtration to the Widow or next of Kin, deeming the party to have dyed inteſtate. *Franc. Manticade conject. ult. volunt. lib. 2. Tit. 3. num. 12. Swin. part 4. ſect. 4. num.* 8.

383. Note, That the Ordinary may call the Adminiſtrator to account, but he cannot force him to make diſpoſition of the ſurpluſage of the Inteſtates goods after Debts payd, by the true meaning of the 21 *H.* 8. *C.* 5. but what remains ſhall go to the Adminiſtrator, in caſe there be any more Debts to pay, which as yet are not come to his knowledge: and if the Ordinary will meddle to cauſe a diſpoſition to be made, a Prohibition will be granted againſt him, if the Adminiſtrator requeſt it. *M. 6 Car. 1. B. R. Le-*

R. Levans caſe. Cro. 3 part. Rep. fol. M. 15 Jac. C. B. Tooker and Loans Ca. Hobbarts Rep. fol. 190. *Paſc. 24 Car. 1. B. R. Hill and Birds caſe. Styles Rep. fol. Brownlowes 1 part Rep. pa.* 32. *And Vide Slawneys caſe. Hobbarts Rep. fol.* 83.

384. An Adminiſtrator accompted before the Ordinary, and proved payment by one VVitneſs: and becauſe the Ordinary would not allow of proof by one VVitneſs, but did excommunicate the party for want of proof; a Prohibition was thereupon granted, and the Book ſays there, that the juriſdiction of the Spiritual Court is not taken away by the Prohibition, but their proceedings only. *P. 2 Car. B. R. Bellamy and Aldens ca. Latches Rep. fol.* 117.

385. Now as touching the Intereſt of the Ordinary in the goods of the Inteſtate that comes to his hands, note that it is only ſuch an intereſt as an Adminiſtrator *durante minori ætate Executoris* hath, and therefore he

he cannot give nor ſell the Goods of the Inteſtate, or do any thing to his prejudice. *M. 9 El. Dyer, fol.* 256. *Co. 2 part Inſt. fol.* 398.

386. And ſo if the Ordinary make a Letter to one *Ad colligendum bona Defuncti, & ad vendendum ea quæ peritura eſſent, & inde Compatum reddere:* In this caſe if the Grantee ſell the Goods, he may be charged as Executor of his own wrong; for the Ordinary himſelf having not power to ſell, cannot give more power then he hath. *Swin. part* 4. *ſect.* 16. *in fine. M.* 9 *El. Dyer, fol.* 256.

387. If no goods come to the hands of the Ordinary, he is not chargeable by the Law; but if any come to his hands and poſſeſſion, and he will neither Adminiſter and pay the Debts and Duties himſelf, nor commit Adminiſtration to the Friends and Kin of the Inteſtate that would, then he is chargeable by the Law, for ſo much as comes to his

hands, and is lyable to the ſame Actions as other Adminiſtrators are: But the Ordinary cannot have an Action of Debt, Covenant, nor any other Action which belonged to the Inteſtate; but he to whom he commits Adminiſtration may: ſo that he is ſubject to the charge and trouble of an Adminiſtrator, but is excluded from the priviledges belonging to an Adminiſtrator. 7 *H.*4. *fol.*18. *F. N.B.* 92. *a. Co.* 2 *part Inſt. fol.* 398. *Weſt.* 2. *C.*19. *Fynches Law, pag.*174.

388. If an Action of Debt be brought againſt the Ordinary for a Debt of the Inteſtates, after notice given him of the ſame, he may not Adminiſter to others, if he have not ſufficient to ſatisfie that debt. *M.*7 *El. Dyer, fol.*233.

389. If the Ordinary take goods of the Inteſtates into his hands, and after commits Adminiſtration, and notwithſtanding ſtill retains the goods; in this caſe he ſhall be charged ſtill, as if he had not at all committed any

any Adminiſtration. 11 R. 2. *Admin.* 21. *Co.* 2 *part Inſt. fol.* 398.

390. Where the Ordinary doth take goods of the Inteſtates, being out of his Dioceſs; here he ſhall not be charged as Ordinary, but as Executor in his own wrong. 12 R. 2. *Admin.* 21. *Co.* 2 *part Inſt. fol.* 398.

391 If the goods of the Inteſtates come to the hands of the Ordinary, and he dyeth, his Executors or Adminiſtrators ſhall be charged in an Action of Debt, by the *Stat. Weſtmin.* 2. *C.* 19. *Weſtmin.* 2. *c.* 19. *Co.* 2 *part Inſt. fol.* 398. *Regiſt. fol.* 141. 11 *E.* 3. *Exec.* 177.

392. Having ſpoken before concerning a Codicil, I thought good here to inſert the uſual form thereof, as followeth, *viz.*

393. *Be it known unto all men by theſe preſents, That whereas I* Henry Walker *of* R. &c. *have made and declared my laſt Will and Teſtament in writing, bearing date,* &c. *I the ſaid* Henry Walker *by this preſent*

Codicil do confirm and ratifie my ſaid laſt Will and Teſtament, and do give and bequeath unto Roger Myton *of* Lympton *my beſt Suit of Clothes: and my Will and meaning is, that this Codicil or Schedule be, and be adjudged to be part and parcel of my ſaid laſt Will and Teſtament; and that all things herein contained and mentioned be faithfully and truly performed, and as fully and amply in every reſpect, as if the ſame were ſo declared, and ſet down in my ſaid laſt Will and Teſtament. In Witneſs whereof, I the ſaid* Henry Walker *have hereunto ſet my Hand and Seal this* 25th *day of* July, *in the* 19th *year of the Reign of our moſt gracious Soverain Lord King* Charles *the Second, and in the year of our Lord God* 1667.

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